THE STUDENT'S GUIDE

TO THE

PRINCIPLES OF EQUITY.

With the Publisher's compliments. The favour of a review will oblige.

THE

STUDENT'S GUIDE

TO THE

PRINCIPLES OF EQUITY.

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LONDON:

GEO. BARBER, "LAW STUDENTS' JOURNAL" OFFICE,

16 & 17, CURSITOR STREET, CHANCERY LANE.

1894.

LONDON:
PRINTED BY GEO. BARBER, CURSITOR STREET,
CHANCERY LANE, E.C.

ADVERTISEMENT.

THIS little work forms one of a series of Guides to the Bar Final by the Authors. The others are—on Real and Personal Property, third edition, by Messrs. Indermaur and Thwaites; on Criminal Law, third edition, by Mr. Thwaites; on Common Law, third edition, by Mr. Indermaur; on Procedure and Evidence, by Messrs. Indermaur and Thwaites; on Trusts and Partnerships, second edition, by Mr. Indermaur; and on Specific Performance and Mortgages, by Messrs. Indermaur and Thwaites. The two Guides last named are now obsolete, and their place is supplied by this new Guide to the Principles of Equity. Messrs. Indermaur and Thwaites have in preparation a Guide to Constitutional Law and Legal History.

It is hoped that this book will be found of use by the class for whom it is written. Though particularly intended for Bar Students, it may, perhaps, be found of service to Articled Clerks as well.

Messrs. Indermaur and Thwaites continue to prepare Students in class, privately, and by post, for the Bar Final Examinations, Solicitors' Final (Pass and Honours) Examinations, and Solicitors' Intermediate Examination. Particulars may be had on application, personally or by letter, to Messrs. Indermaur and Thwaites, at their Chambers, 22, Chancery Lane, London, W.C.

22, CHANCERY LANE, LONDON,
July, 1894.

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THE STUDENT'S GUIDE

TO THE

PRINCIPLES OF EQUITY.

I.—THE COURSE OF READING.

Our special intention in this small work is to afford some assistance to Bar students in studying the Principles of Equity. It is one of a series of Guides which we have issued for the special help of Bar students. At the same time, it is hoped that the work will be found useful by articled clerks, as they equally are examined in the Principles of Equity.

We need not dwell here upon the scheme of subjects for the Bar Final Examination, but the Principles of Equity will form a compulsory subject for this examination at and after Easter Term, 1895.

We purpose, first of all, to give some advice to the Bar student in his course of reading the Principles of Equity; and, next, to give him such additional material as will assist him in attaining a successful result at his examination. This additional material consists of—(1) An Epitome of the Trustee Act 1893; (2) A Set of Test Questions on the Principles of Equity; and (3) A Digest of Questions and Answers. A good many of these questions have actually been set at past Bar Final Examinations, and others have been added by ourselves as we deemed advisable. The Test Questions are set in the order of the book upon

which they are founded, and the Digest of Questions and Answers is also, as far as possible, systematically arranged.

Dealing, first, with the student who desires to obtain a very sound knowledge, and not merely to read with a view to satisfying the scope of the examination, we suggest that he may well read the following works :—

1. Indermaur's Manual of the Principles of Equity (3rd edition, published in 1894).

2. Snell's Principles of Equity (10th edition, published in 1892).

3. White and Tudor's Leading Equity Cases (6th edition, published in 1886).

4. Underhill's Law of Trusts (4th edition, published in 1894).

5. Go through the entire set of Test Questions in this book, writing out answers to some of them, at all events, by way of practice.

6. Finally conclude with a study of the Questions and Answers in this book.

This certainly forms a very fairly complete course of reading. It is doubtful how far a study of the Law of Companies can be considered as coming in under the head of Equity, and we do not think the perusal of a separate work on the subject necessary, but if the student has time and inclination we would suggest Eustace Smith's Summary of the Law of Companies (5th edition, published in 1891). This is only a small work, and will not take long. Again, it would not be out of place to peruse Pollock's Law of Partnership (5th edition, published in 1890).

All this will take some time, but the only very formidable book we have recommended is "White and Tudor." To thoroughly go through this work and grasp its contents will be to acquire a very large amount of knowledge, and more than is strictly necessary for the examination. Still we hope many students desire to soar above mere examination necessities.

To any who read "White and Tudor" we would recommend also Indermaur's Epitome of Conveyancing and Equity Cases (7th edition, published in 1891). In this they will find short notes of the cases in "White and Tudor," and they can have the book interleaved if they like, and materially add to the notes. As regards those students who have not at present such ambitious desires, we think they can safely leave out "White and Tudor," and rely on Indermaur's Epitome. The best way to deal with these cases is to first look them up, and consider them from time to time whilst reading the text-book, and then afterwards to go straight through them.

Even leaving out "White and Tudor," the student has a fair amount of reading in our list. If time is scarce, Underhill's Trusts may, we think, be omitted. It has grown too big now for ordinary students, unless they are very much in earnest. Then, finally, it will be observed that we have given two text-books. It is, perhaps, best to read them both, but if the student is aiming for the present only at the examination he can omit one of them—whichever he likes. Snell's Equity contains 740 pages; Indermaur's Equity contains 396 pages.

We have advised in sufficient width, and given the student a choice. Let us now indicate the smallest possible amount of reading a student can with safety do for the purposes of the Examination.

1. Indermaur's Manual of the Principles of Equity, referring from time to time to some of the most important cases in "White and Tudor," which can be sufficiently looked up in Indermaur's Epitome of Conveyancing and Equity Cases.

2. Work thoroughly through the set of Test Questions hereafter given.

3. Finally study the Digest of Questions and Answers in this book.

We shall presently indicate the most important of the cases in "White and Tudor," and give a list of important Statutes. Some of them relate more particularly,

perhaps, to the Law of Real and Personal Property and the Practice of Conveyancing, and the student very likely will already be acquainted with them from his study of that subject.

As the Bar Examination is, for the present at least, confined to the topics which have been treated in the Lectures and Classes, held under the auspices of the Council of Legal Education, for a period of two years prior to the particular examination, the Bar Student is recommended, if he can, to get the prospectuses of the Lectures and Classes for the eight terms immediately prior to his examination, and more or less to shape his reading with a special view to the topics therein set forth. Still this is not necessary; the best and only safe course is to make a study of Equity generally, in the way we have indicated. However, special attention to particular topics lectured on would be well.

We will now give a list of the most important Statutes which we consider even the elementary student should look up in connection with the Principles of Equity. Most of these Statutes are touched upon sufficiently in the works we have already indicated, but as regards some it would be advisable for the student to read them from the Statutes of the Realm, or, if they are recent Acts, to study the Epitomes published from time to time in the *Law Students' Journal*, usually in the numbers for September or October in each year.

27 Henry 8, c. 10 . .	Statute of Uses.
12 Car. 2, c. 24 . .	Guardianship.
29 Car. 2, c. 3 (secs. 7, 8 and 9)	Statute of Frauds.
13 Eliz., c. 5 . . .	Frauds on Creditors.
39 & 40 Geo. 3, c. 98, and 55 & 56 Vict., c. 58 . .	Thellusson Act, and Amendment thereof.
1 Will. 4, c. 40. . .	Undisposed-of Residue.
1 Will. 4, c. 46. . .	Illusory Appointments.

3 & 4 Will. 4, c. 104.	Debts.
1 Vict., c. 26	Wills.
17 & 18 Vict., c. 113. 30 & 31 Vict., c. 69 40 & 41 Vict., c. 34	Real Estates Charges Acts.
18 & 19 Vict., c. 43	Infants Settlements.
20 & 21 Vict., c. 57	Malins' Act.
30 & 31 Vict., c. 48	Auction Sales of Land.
31 Vict., c. 4	Sale of Reversionary Interests.
31 & 32 Vict., c. 40 39 & 40 Vict., c. 17	Partition Acts.
32 & 33 Vict., c. 46	Hinde Palmer's Act.
36 Vict., c. 12 49 & 50 Vict., c. 27 54 Vict., c. 3	Custody and Guardianship of Infants.
45 & 46 Vict., c. 75 56 & 57 Vict., c. 63	Married Women's Property Acts.
51 & 52 Vict., c. 42 54 & 55 Vict., c. 73	Mortmain Acts.
51 & 52 Vict., c. 59 (sec. 8) 56 & 57 Vict., c. 53	Trustee Acts 1888 and 1893.
53 & 54 Vict., c. 39	Partnership Act 1890.
56 & 57 Vict., c. 21	Voluntary Conveyances Act 1893.

The following is a list of some of the most important cases on the Principles of Equity which should be looked up from "White and Tudor," or from Indermaur's Epitome of Conveyancing and Equity Cases, and considered with care :—

Ackroyd v. Smithson.
Agra Bank v. Barry.
Aleyn v. Belchier.
Ancaster (Duke of) v. Mayer.
Aylesford (Earl of) v. Morris.
Basset v. Nosworthy.
Blandy v. Widmore.

Brice v. Stokes.
Chancey's Case.
Chesterfield (Earl of) v. Janssen.
Cuddee v. Rutter.
Dering v. Earl of Winchelsea.
Dyer v. Dyer.
Elibank (Lady), v. Montolieu.
Ellison v. Ellison.
Eyre v. Countess of Shaftesbury.
Fletcher v. Ashburner.
Fox v. Mackreth.
Glenorchy (Lord) v. Bosville.
Hooley v. Hatton.
Howe v. Earl of Dartmouth.
Huguenin v. Baseley.
Hulme v. Tenant.
Huntingdon v. Huntingdon.
Keech v. Sandford.
Lake v. Craddock.
Lake v. Gibson.
Lansdowne v. Lansdowne.
Lechmere v. Lechmere.
Lester v. Foxcroft.
Mackreth v. Symons.
Marsh v. Lee.
Peachey v. Duke of Somerset.
Penn v. Lord Baltimore.
Pusey v. Pusey.
Pye, Ex parte.
Robinson v. Pett.
Russel v. Russel.
Somerset (Duke of) v. Cookson.
Talbot v. Duke of Shrewsbury.
Tollet v. Tollet.
Woollam v. Hearn.

We now proceed to give the various matters before referred to, namely—An Epitome of the Trustee Act 1893; Test Questions on Equity (being a Set of Questions founded on Indermaur's Manual of Equity); and Digest of Questions and Answers. As regards the Trustee Act 1893, though the Act itself is set out in full in the Appendix to Indermaur's Manual of Equity, we have thought that an Epitome of it may be acceptable to some of our readers.

II.—EPITOME OF THE TRUSTEE ACT 1893.

(56 & 57 Vict., c. 53.)

This is an Act of 54 sections to consolidate the existing statute law relating to trustees. It makes no changes in the law. It does not apply to Scotland. It repeals (and re-enacts) all or part of 33 Statutes, viz.:—

Legacy Duty Act 1796, sec. 32.

Public Money Drainage Act 1846, sec. 37.

10 & 11 Vict., c. 32, sec. 53.

10 & 11 Vict., c. 96
11 & 12 Vict., c. 68 } Trustee Relief Acts.
12 & 13 Vict., c. 74

Trustee Act 1850, secs. 7 to 19, 22 to 25, 29, 32 to 36, 46, 47, 49, 54, 55; and also all other sections except as to Lunacy Courts in Ireland.

Trustee Act 1852, secs. 1 to 5, 8, 9; also the remainder except as to Lunacy Courts in Ireland.

Chancery Court of Lancaster Act 1854, sec. 11.

Merchant Shipping Act 1855, sec. 10, except as to Lunacy Courts in Ireland.

Irish Bankrupt and Insolvent Act 1857, sec. 322.

22 & 23 Vict., c. 35, secs. 26, 30, 31.

23 & 24 Vict., c. 38, sec. 9.

25 & 26 Vict., c. 108.

26 & 27 Vict., c. 73, sec. 4.

Improvement of Land Act 1864, sec. 60, so far as relates to trustees, and sec. 61.

Mortgage Debenture Act 1865, sec. 40.

Partition Act 1868, sec. 7.

National Debt Act 1870, sec. 29.

Debenture Stock Act 1871.

Vendor and Purchaser Act 1874, secs. 3 and 6.

Local Loans Act 1875, secs. 21 and 27.

Colonial Stock Act 1877, sec. 12.

Isle of Man Loans Act 1880, sec. 7, so far as relates to trustees.

Conveyancing Act 1881, secs. 31 to 38.

Conveyancing Act 1882, sec. 5.

Bankruptcy Act 1883, sec. 147.

Trustee Act 1888, except secs. 1 and 8.

Trust Investment Act 1889, except secs. 1 and 7.

Palatine Court of Durham Act 1889, sec. 8.

Lunacy Act 1890, sec. 140.

Settled Land Act 1890, sec. 17.

Conveyancing Act 1892, sec. 6.

Part I.—Investments (secs. 1-9).

Sec. 1.—*Authorised investments.*—A trustee (unless expressly forbidden by the trust instrument) may invest—

(*a*) In parliamentary stocks or public funds or Government securities of the United Kingdom:

(*b*) On real or heritable securities in Great Britain or Ireland:

(*c*) In stock of the Banks of England or Ireland:

(*d*) In India 3½ Per Cent. Stock and India 3 Per Cent.

Stock, or in any other capital stock issued by the Secretary of State in Council of India under an Act of Parliament, and charged on the revenues of India:

(*e*) In any securities the interest of which is guaranteed by Parliament:

(*f*) In consolidated stock created by the Metropolitan Board of Works, or London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:

(*g*) In the debenture or rent-charge or guaranteed or preference stock of a railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last before the investment paid a dividend of not less than 3 per cent. per annum on its ordinary stock:

(*h*) In stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for not less than 200 years at a fixed rental to any railway company mentioned in sub-section (*g*):

(*i*) In debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(*j*) In "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways; and any like annuities hereafter created on the purchase of a railway by the Secretary of State in Council of India and charged on the revenues of India and which any statute may authorise trustees to accept in lieu of stock held by them in the purchased railway; also in deferred annuities of Class D and annuities of Class C of the East Indian Railway Company:

(*k*) In stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of

India, or upon the capital of which the interest is so guaranteed :

(*l*) In debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established to supply water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last before the investment paid a dividend of not less than £5 per cent. on its ordinary stock :

(*m*) In nominal or inscribed stock issued by the corporation of any municipal borough having, according to the last census prior to the investment, a population exceeding 50,000, or by any county council, under the authority of any Act of Parliament or Provisional Order :

(*n*) In nominal or inscribed stock issued by any commissioners incorporated by Act of Parliament to supply water ; with a compulsory power of levying rates over an area having, according to the last census prior to the investment, a population exceeding 50,000, provided that during each of the ten years last before the investment the rates so levied shall not have exceeded 80 per cent. of the amount authorised by law to be levied :

(*o*) In stocks, funds, or securities for the time being authorised for the investment of cash in the High Court.

Sec. 2.—*Redeemable stocks.*—A trustee may invest in the securities named in section 1, although they are redeemable. But he may not buy redeemable stocks (*g*), (*i*), (*k*), (*l*), and (*m*), named in that section—(*a*) above the redemption value, if liable to be redeemed within 15 years, or (*b*) at more than 15 per cent. above the redemption value. He may keep redeemable stock so bought until redemption.

Sec. 3.—*Discretion of trustees.*—Every power conferred

by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the trust instrument for investment of trust funds.

Sec. 4.—*Application of preceding sections.*—The preceding sections apply to all trusts whether created before or after this Act, and the powers thereby conferred are in addition to the powers conferred by the trust instrument.

Sec. 5.—*Enlargement of express powers of investment.*—(1) Power to invest in real securities shall authorise (and be deemed to have always authorised) an investment (*a*) On mortgage of property held for an unexpired term of not less than 200 years, and not subject to a rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry except for non-payment of rent; and (*b*) On any charge or upon mortgage of any charge, made under the Improvement of Land Act 1864.

(2) A trustee having power to invest in mortgages or bonds of any railway company or of any other company may (unless the trust instrument forbids) invest in the debenture stock of such railway or other company.

(3) A trustee having power to invest money in debentures or debenture stock of any railway or other company may (unless the trust instrument forbids) invest in nominal debentures or nominal debenture stock issued under the Local Loans Act 1875.

(4) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may (unless the trust instrument forbids) invest in securities under the Isle of Man Loans Act 1880.

(5) A trustee having a general power to invest in or upon the security of shares, stock, mortgages, bonds or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures issued under the Mortgage Debenture Act 1865.

Sec. 6.—*Power to invest, notwithstanding drainage charges.* —A trustee having power to invest in purchase or mortgage of land may invest in such purchase or mortgage, although the land is charged with a rent under the Public Money Drainage Acts 1846 to 1856, or the Landed Property Improvement (Ireland) Act 1847, or by an absolute order under the Improvement of Land Act 1864, unless the trust instrument expressly forbids.

Sec. 7.—*Trustees not to convert inscribed stock into certificates to bearer.*—A trustee (unless authorised by the terms of his trust) shall not apply for or hold any certificate to bearer issued under the India Stock Certificate Act 1863, or the National Debt Act 1870, or the Local Loans Act 1875, or the Colonial Stock Act 1877.

Sec. 8.—*Loans by trustees.*—(1) A trustee lending money on security of any property on which he can lawfully lend, is not chargeable with breach of trust *by reason only* of the proportion borne by the amount of loan to the value of the property at the time when the loan was made, *provided* it appears to the Court that the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer (local or otherwise), instructed and employed independently of any owner of the property, and the loan did not exceed two equal third parts of the value of the property as stated in such report, and the loan was made under the advice of the surveyor or valuer expressed in such report.

(2) A trustee lending money on leaseholds is not chargeable with breach of trust because he dispenses (wholly or partly) with production or investigation of the lessor's title.

(3) A trustee is not chargeable with breach of trust only because in effecting a purchase or mortgage he accepts a shorter title than a purchaser is (in the absence of a special contract) entitled to, if the Court think a person acting

with prudence and caution would have accepted the same title.

(4) This section applies to transfers of existing securities as well as to new securities, and to investments made before or after this Act.

Sec. 9.—*Liability or loss on improper investments.*—Where a trustee advances an improper amount (before or after this Act) on a proper mortgage security, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the excess with interest.*

Part II.—Various Powers and Duties of Trustees (secs. 10-24).

Appointment of new Trustees.

Sec. 10.—*Power of appointing new trustees.*—(1) Where a trustee (original or substituted, appointed by a Court or otherwise) is dead, or remains out of the United Kingdom for more than 12 months, or desires to be discharged, or refuses to act, or is unfit to act, or is incapable of acting—the persons nominated to appoint new trustees by the trust instrument, or (if there is no such person, or if he is not able and willing to act) the surviving or continuing trustees, or the personal representatives of the last trustee may, by writing, appoint a new trustee or trustees in his place.

(2) On the appointment of a new trustee—(*a*) the number of trustees may be increased; and (*b*) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part, although

* With regard to trustees' investments see also the Trustee Act 1893 Amendment Act 1894 (57 Vict., c. 10, sec. 4), which provides that a trustee shall not be liable for a breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by the general law.

no new trustees are to be appointed for such other part, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed one separate trustee may be appointed for the first-mentioned part; and (*c*) it shall not be obligatory to appoint more than one new trustee where only one was originally appointed, or to fill up the original number where more than two were originally appointed, but (except where only one trustee was originally appointed) a trustee shall not be discharged under this section unless there will be two trustees to perform the trust; and (*d*) anything requisite for vesting the trust property jointly in the trustees shall be done.

(3) Every new trustee so appointed (both before and after the trust property becomes vested in him) shall have the same powers, and may act as if he had been an original trustee.

(4) In this section, a trustee who is dead includes a person nominated trustee in a will but dying before the testator; and a continuing trustee includes a refusing or retiring trustee, if willing to act for this section.

(5) This section applies (subject to anything expressed in the trust instrument) to trusts created before or after this Act.

Sec. 11.—*Retirement of trustee.*—Where there are more than two trustees, if one by deed declares that he is desirous of being discharged, and if his co-trustees and any other person empowered to appoint trustees, by deed consent to his discharge, such trustee shall be discharged without a new trustee being appointed. Any assurance to vest the trust property in the continuing trustees alone shall be executed. This section applies (subject to anything expressed in the trust instrument) to trusts created before or after this Act.

Sec. 12.—*Vesting of trust property in new or continuing trustees.*—(1) Where *a deed* by which a new trustee is appointed contains a declaration by the appointor that any estate or interest in any land or chattel subject to the trust, or the right to recover and receive any debt or other thing

in action so subject, shall vest in the persons who by the deed become and are the trustees, that declaration shall (without any conveyance or assignment) vest in those persons, as joint tenants, for the purposes of the trust, that estate, interest, or right.

(2) Where a deed by which a retiring trustee is discharged contains such a declaration as aforesaid by the retiring and continuing trustees, and by any other person empowered to appoint trustees, that declaration shall (without any conveyance or assignment) vest in the continuing trustees alone, as joint tenants, such estate, interest, or right.

(3) This section does not extend (1) to any legal estate in copyholds, or (2) to land mortgaged for securing trust money, or (3) to any share, stock, annuity, or property only transferable in books kept by a company or other body, or as directed by some statute.

(4) This section applies only to deeds executed after 31st December 1881.

Purchase and Sale.

Sec. 13.—*Power of trustee for sale to sell by auction, &c.* —(1) Where a trust for sale or a power of sale (created by an instrument coming into operation since 1881) is vested in a trustee, he may (subject to anything in the trust instrument) sell or concur with others in selling, either subject to prior charges or not, together or in lots, by public auction or by private contract, subject to such conditions as the trustee thinks fit, with power to vary any contract for sale, and to buy in, or to rescind any contract and resell, without being answerable for any loss.

Sec. 14.—*Depreciatory conditions.*—(1) No sale by a trustee shall be impeached by a beneficiary because the conditions of sale were depreciatory, unless it appears that the consideration was thereby rendered inadequate.

(2) No sale by a trustee shall, after execution of the

conveyance, be impeached against the purchaser on the ground of depreciatory conditions, unless it appears that the trustee and the purchaser were acting in collusion when the contract was made.

(3) No purchaser on a sale by a trustee can object to the title because of depreciatory conditions.

(4) This section applies only to sales made after 24th December, 1888.

Sec. 15.—A trustee may sell or buy without excluding Section 2 of the Vendor and Purchaser Act 1874.

Sec. 16.—When any freehold or copyhold is vested in a married woman as a bare trustee she may convey or surrender like a *feme sole.*

Various Powers and Liabilities.

Sec. 17.—*Receipt of money by banker or solicitor.*—(1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property, by permitting the solicitor to have custody of and to produce a deed containing the receipt referred to in Section 56 of the Conveyancing Act 1881.

(2) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any insurance money, by permitting him to have custody of and to produce the policy with a receipt signed by the trustee.

(3) This section does not exempt a trustee from liability if he permits such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable him to pay or transfer the same to the trustee.

(4) This section applies only after 24th December, 1888; and is subject to the express terms of the trust instrument.

Sec. 18.—*Power to insure.*—Subject to the provisions of the instrument creating the trust, every trustee—unless he is bound forthwith to convey absolutely to any beneficiary

on request—may insure against fire any building or other insurable property to any amount not exceeding three-fourths of its full value, and pay the premiums out of income.

Sec. 19.—*Power of trustees of renewable leaseholds to renew.*—A trustee of leaseholds for lives or years which are renewable, may (and must, if required by any beneficiary), use his best endeavours to obtain from time to time a renewed lease on the accustomed and reasonable terms, and for that purpose may do all needful acts. If by the terms of the settlement or will the person in possession is under no obligation to renew, this section does not apply without his consent in writing. Money required to pay for the renewal may be paid by the trustee out of the trust funds or raised on mortgage. This section applies to trusts created before or after this Act, but is subject to the express terms of the trust instrument.

Sec. 20.—*Power of trustee to give receipts.*—The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power—whether created before or after this Act—shall be a sufficient discharge, and effectually exonerate the person paying from seeing to the application of being answerable for any loss or misapplication thereof.

Sec. 21.—*Power for executors and trustees to compound, &c.*—(1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) An executor or administrator, or two or more trustees acting together, or a sole acting trustee, where by the trust instrument one only can act, may accept any composition or security (real or personal) for any debt or for any property claimed, and may allow time for payment, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever

relating to the testator's or intestate's estate or to the trust.

(3) This section is subject to the terms of any instrument creating the trust.

(4) This section applies to executorships, administratorships and trusts created before or after this Act.

Sec. 22.—*Powers of two or more trustees.*—Where a power or trust is given to or vested in two or more trustees jointly (unless the trust instrument forbids), the same may be exercised by the survivor or survivors for the time being. But this section applies only to trusts created by instruments coming into operation after 31st December, 1881.

Sec. 23.—*Exoneration of trustees acting under power of attorney.*—A trustee acting or paying money in good faith under any power of attorney shall not be liable for any such act or payment if at the time of the payment or act the grantor of the power of attorney was dead or had avoided the power, but this was not known to the trustee. Any person entitled to the money shall have the same remedy against the person to whom the trustee paid it as he would have had against the trustee.

Sec. 24.—*Implied indemnity of trustees.*—A trustee shall (without prejudice to the provisions of the trust instrument) be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom the trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself all expenses incurred in the execution of his trusts or powers.

Part III.—Powers of the Court (secs. 25-46).

Sec. 25.—The High Court may by order appoint a new trustee—(1) when it is expedient to do so, and it is found inexpedient, difficult, or impracticable to do so without the help of the Court; or (2) if a trustee is convicted of felony or bankrupt. This section gives no power to appoint an executor or administrator.

Secs. 26 to 41 deal with vesting orders. They empower the High Court to make vesting orders or to appoint some person to convey in various cases, *e.g.*,—(1) where the High Court appoints a new trustee; (2) if a trustee is an infant, or out of the jurisdiction, or cannot be found; (3) if it is uncertain which trustee was the survivor, or whether the survivor is living or dead, or if the last trustee left no heir or personal representative; (4) if a trustee wilfully neglects or refuses to convey for 28 days after he has been required to do so; (5) if a mortgagee is an infant; (6) consequential on a judgment for sale, mortgage or specific performance.

Payment into Court by trustees (*sec.* 42).

Trustees (or the majority of them) may pay the trust money or securities into Court, and the certificate of the paymaster shall be a sufficient discharge. If the majority of the trustees wish to pay into Court, but the concurrence of the minority cannot be obtained, the High Court may by order sanction such payment by the majority.

Miscellaneous.

Sec. 43.—If a trustee defendant cannot be served with process after diligent search, the High Court may try the action in his absence, and he shall be bound by the proceedings.

Sec. 44.—If a trustee [or other person]* has power to sell, exchange, partition, or enfranchise, the High Court may sanction a disposition of the land without the mining rights or of the mining rights without the surface. This is not to derogate from any powers possessed by the trustee under the Settled Land Acts or otherwise.

Sec. 45.—*Indemnity for Breach of Trust.*—If a trustee (before or after this Act) commits a breach of trust (1) at the instigation, or (2) at the request, or (3) with the consent in writing of a beneficiary, the High Court may—even if the beneficiary is a married woman restrained from anticipation—by order impound all or part of the beneficiary's interest to indemnify the trustee.

Sec. 46.—*Inferior Courts.*—All the provisions of this Act as to the High Court apply to Palatine Courts and County Courts in cases within their jurisdiction.

Part IV.—Miscellaneous and Supplemental (secs. 47-54).

Sec. 47.—*Settled Land Acts.*—All the provisions of this Act as to appointment of new trustees, and discharge and retirement of trustees, apply to trustees for the purposes of the Settled Land Acts 1882 to 1890.

Sec. 48.—*Trustee becoming a convict.*—The legal estate in property vested in a trustee or mortgagee who becomes a convict within the Forfeiture Act 1870 shall not vest in the administrator under that Act, but shall remain vested in him or survive to his co-trustee, or descend to his representative as if he were not a convict.

Sec. 50 gives definitions.

* The words in brackets were added by the Trustee Act 1893 Amendment Act 1894 (57 Vict., c. 10, sec. 3).

III.—TEST QUESTIONS ON INDERMAUR'S MANUAL OF EQUITY. (3rd Edition.)

PART I.

Chapters I., II., and III.

1. Give a brief account of the origin of the Court of Chancery, and explain how Equity became in course of time a fixed system of jurisprudence. (1-5.)

2. Define Equity. What maxim is said to form the very foundation of Equity jurisprudence? (6-7.)

3. Explain and illustrate the maxims: "Equity follows the Law," and "Equity regards the spirit and not the letter." (8-9.)

4. What two equitable maxims have to be considered in determining the priorities of parties claiming rights in Equity? Compare the maxims and show their respective force. (9-15.)

5. Explain and illustrate the maxims: "He who comes into Equity must come with clean hands," and "Equality is Equity." (18, 19.)

6. Discuss shortly the force and effect of the maxim, *Vigilantibus non dormientibus æquitas subvenit.* (20-23.)

7. Enumerate some of the chief matters which are now, by the Judicature Act 1873, assigned to the exclusive jurisdiction of the Chancery Division. (25.)

PART II.

Chapter I.

8. Define and classify Trusts. (27, 28.)

9. What was provided by the Statute of Uses? What

was the direct object of this statute, and how has such object been frustrated? (28, 29.)

10. What rules are to be observed as to what may be (1) the subject of a trust; (2) the objects of a trust? (30, 31.)

11. Define an Express Trust. What are the three essentials to constitute a trust? (31.)

12. What do you understand by a Precatory Trust? Does the Court lean in favour of or against such a trust? (31.)

13. When is writing necessary to constitute a valid trust? (32.)

14. When will the Court give effect to and carry out a merely voluntary trust? Give two instances of voluntary trusts which would not be enforced. (33, 34.)

15. Under what circumstances is a trust capable of direct revocation, or liable to be set aside? (34-37.)

16. How may the Statute 13 Eliz., c. 5, affect the subject of trusts? In answering this question, distinguish between the position of persons who are creditors at the time a voluntary settlement is made, and of those who only become creditors afterwards. (37-39.)

17. How formerly might the Statute 27 Eliz., c. 4, affect the subject of trusts? What is provided by the Voluntary Conveyances Act 1893? (39, 40.)

18. Distinguish between Trusts Executed, and Trusts Executory, pointing out in your answer the difference that exists as regards their construction. (40-42.)

19. What do you understand by a Secret Trust? Give an instance of (*a*) a valid secret trust; (*b*) an abortive attempt to create a secret trust. In the latter case point out what would become of the property. (42-44.)

20. Distinguish between Implied and Constructive Trusts, giving an instance of each. (44, 45, 50, 51.)

21. What is the presumption of the Court in each of the following cases? (1) A pays the purchase-money for Whiteacre, and has it conveyed to B, a stranger. (2) A pays the

purchase-money for Whiteacre, and has it conveyed to B, his son. (3) A, a widow, pays the purchase-money for Whiteacre, and has it conveyed to B, her son. Would parol evidence be admitted in any of these cases to rebut the presumption? (46, 47.)

22. Distinguish between a Resulting Trust, and a Resulting Use. (48.)

23. What becomes of a person's residuary personal estate when he dies leaving a will which appoints an executor, but such will contains no residuary clause? (48, 49.)

24. A testator gives real and personal property to a trustee, in trust for A absolutely. A is living at the testator's death, but dies immediately after the testator, intestate, and without relatives. What becomes of the property? (48, 49.)

25. Explain the nature of the right known as a vendor's lien for unpaid purchase-money, pointing out the principle upon which the right is allowed to exist. How is such lien liable to be lost? (51, 52.)

26. What trusts are properly said to be charitable? Mention some points in which the Court will show special favour to charitable trusts. (53, 54.)

27. Distinguish between a Charitable and a Superstitious Trust, giving an instance of the latter. Can a valid trust be created in favour of animals? (54-56.)

Chapter II.

28. Explain the statement, "Equity never wants a trustee," and state in what different ways new trustees may be appointed. (58.)

29. What provisions have been made by statute with regard to (*a*) the retirement of trustees; (*b*) the devolution of trust estates; (*c*) trustees giving receipts and compromising claims? (59-61.)

30. State shortly the rule of the Court laid down in Howe v. Earl of Dartmouth, and mention any cases in which that rule will not be acted upon by the Court. (62, 63.)

31. Explain the duties of trustees in selling property. What will be the exact effect of their selling under depreciatory conditions (*a*) as regards themselves; (*b*) as regards a purchaser? (64, 65.)

32. Enumerate some of the ordinary investments allowed by law to be made by trustees. Point out any other investments which may be made by trustees of capital money under the Settled Land Act 1882. (66-68.)

33. State shortly the chief provisions of the Trustee Act 1893, as regards trustees investing money on mortgage. If they advance more than they ought to on a mortgage security, what is their liability? (70, 71.)

34. Is a trustee vendor justified in employing a solicitor to complete a purchase and receive the purchase-money; and is the purchaser safe in paying over his purchase-money to such solicitor? (76.)

35. Is a trustee liable for the defaults of an agent whom he employs? Refer hereon to the case of *Re* Speight, Speight v. Gaunt. (76.)

36. Under what circumstances will a trustee be liable for loss caused by the failure of a bank in which he has deposited trust money? (78, 79.)

37. What is the liability of a trustee who lets the trust money remain idle, instead of investing it as he ought to have done? Does any right of contribution in respect of breaches of trust exist between trustees? (79, 80.)

38. A trustee purchases the trust property of his *cestui que trust*. State the rules of the Court hereon. (81, 82.)

39. To what extent has the Trustee Act 1888 altered the rule in Equity, that lapse of time is no bar to a claim by a *cestui que trust* against his trustee on an express trust? (82, 83.)

40. A *cestui que trust* procures his trustee to commit a breach of trust. Can he afterwards make the trustee liable for this? Does it make any difference if the *cestui que trust* happens to be an infant, or a married woman on whom the trust property was settled without power of anticipation? (84, 85.)

41. When does bankruptcy discharge a trustee from the consequences of a breach of trust? If a trustee becomes bankrupt having trust property or money in his possession, can it be followed and claimed by the *cestui que trust?* (87.)

42. A trustee wrongfully applies a portion of the trust moneys in the purchase of land. What are the *cestui que trust's* rights? (88.)

43. What is the rule of the Court as to the amount of care and diligence required from trustees? Does it make any difference if the trustee is remunerated? (88, 89.)

44. Is a trustee bound to answer an inquiry as to what incumbrances his *cestui que trust* has created? If he answers such an inquiry is he liable if the information he gives is inaccurate? (89, 90.)

45. To what extent, if at all, does the institution of legal proceedings interfere with the exercise of their powers by trustees? (92.)

46. What practical provisions for the relief and assistance of trustees have been made by the Trustee Act 1893, and by Order LV., rule 3, respectively? (93-95.)

47. What are the mutual rights and duties of trustees and *cestuis que trustent* respectively on the termination of a trust? (95, 96.)

Chapter III.

48. What do you understand by the expression the "executor's year?" If debts are owing to an estate, what is the duty of the executor as regards suing for them? (97, 98.)

49. Explain the position of executors or trustees who carry on the business of a deceased person under a direction contained in his will. (98, 99.)

50. Is an executor justified in (*a*) preferring one creditor to another; (*b*) paying a statute-barred debt; (*c*) retaining a statute-barred debt due to himself? (100-103.)

51. Distinguish between the different kinds of legacies. Explain the expressions Lapse, Ademption, and Abatement respectively. (103, 104.)

52. Distinguish between a Vested and a Contingent legacy. As regards legacies payable *in futuro*, what distinction is there according to whether the legacy is a purely personal one, or one charged on land? (104, 105.)

53. When does a legacy carry interest? (106.)

54. What is a *donatio mortis causâ?* In what respects does it differ from, and resemble, a legacy? (106, 107.)

55. What is the difference between Legal and Equitable assets? (108, 109.)

56. State the order in which debts are paid out of legal assets. Does this order apply equally to equitable assets? (108, 109.)

57. Discuss, and explain shortly, the provisions of the 10th section of the Judicature Act 1875, and the 125th section of the Bankruptcy Act 1883 (as amended by the Bankruptcy Act 1890), with regard to the administration of insolvent estates. When a deceased insolvent's estate is being administered in bankruptcy, do the rules of bankruptcy all, without exception, apply? If not, state in what particulars there is any difference. (109-112.)

58. State the order in which the different assets of a deceased person are applied in payment of his debts. Refer in your answer particularly to the decisions in Duke of Ancaster v. Mayer, Hensman v. Fryer, and Lancefield v. Iggulden. (114, 115.)

59. In what cases, contrary to the general rule, is the

general personal estate of a deceased person not the primary fund for payment of his debts? (117-119.)

60. Define, explain, and instance the equitable doctrine known as Marshalling of Assets. (119-121.)

61. What is meant by the statement that the Court will not marshal assets in favour of a charity? How is this affected by the Mortmain Act 1891? (121-124.)

62. Explain the doctrine of marshalling of securities, and give an illustration. What is meant by the statement that there can be no marshalling in favour of a creditor to the prejudice of another's rights? (124-126.)

Chapter IV.

63. Define a Partnership. What Act of Parliament now deals with partnership generally? In what different ways may a partnership be dissolved, and mention the chief grounds on which the Court will decree a dissolution? (127-130.)

64. Discuss the right of a person who has paid a premium to become a member of a firm, to a return of a portion of such premium, in the event of a dissolution taking place before the contemplated time. (131, 132.)

65. What are the rights of the executors of a deceased partner who has died having certain capital belonging to him in the firm, which is not paid for a considerable time? (132, 133.)

66. What is the effect of a clause in partnership articles that in the event of any disputes arising between the partners the same should be referred to arbitration? (133.)

67. On dissolution of a partnership what is the exact position of the partners, or their representatives, with regard to freehold land belonging to the partnership, and the good-will of the partnership? (133, 134.)

68. State shortly the rules of the Court as to the administration of the assets of a partnership. When is proof allowed by or on behalf of the separate estate of one partner, against the assets of the partnership concern? (135.)

69. Are partnership debts joint or several? As regards a deceased partner's share, what two points must be observed by a creditor in pursuing his concurrent remedies? (135, 136.)

70. Of what three kinds are accounts? What is the nature of the relief given by the Court in the case of stated or settled accounts? (136-139.)

71. What are the rules of the Court as to the appropriation of payments between debtor and creditor, as laid down in Clayton's case? In considering this question discuss and explain the decision in *Re* Hallett's Estate. (139, 140.)

Chapter V.

72. Define a Mortgage. Distinguish between *Vivum vadium*, and *Mortuum vadium*. (141.)

73. Explain the maxim, "Once a mortgage always a mortgage." (142.)

74. It is stated that a mortgagee must not make a collateral advantage from his security. Illustrate this statement by reference to the case of James v. Kerr. (143, 144.)

75. Explain the position and rights of a purchaser of an equity of redemption. (144.)

76. A, being entitled to the equity of redemption in certain property, subject to three mortgages, simply pays off the first mortgage; what is his position, and what are the positions of the remaining mortgagees? (144, 145.)

77. Show the practical difference between a mortgage, and a sale with a right of re-purchase. Where it is doubtful whether a transaction was really a mortgage, or a sale with a

right of re-purchase, what circumstances will tend to guide the Court to the conclusion that really the transaction was a mortgage? (146, 147.)

78. Are the following stipulations in a mortgage good: (1) To convert interest into principal if not punctually paid; (2) To increase the rate of interest if not punctually paid? (147, 148.)

79. What do you understand by a Welsh mortgage? (149, 150.)

80. In what ways has the position of a mortgagor been improved by the Judicature Act 1873, and by the Conveyancing Act 1881? (150, 151.)

81. What do you understand by the expression, "Foreclose down, redeem up"? Can anyone besides the mortgagor, or other person directly interested in the equity of redemption, redeem the mortgaged property? (152.)

82. A mortgages freehold and copyhold property to B, who dies. To whom is A to repay the mortgage money, and who is able to revest the property in him? (153, 154.)

83. Within what time must a mortgagee sue to recover his mortgage money? In answering this question refer to the case of Newbould v. Smith. (156, 157.)

84. What liabilities does a mortgagee incur by entering into possession of the mortgaged property? Refer hereon to the recent cases of White v. City of London Brewery Company, and *Re* Prytherch, Prytherch v. Williams. (157, 158.)

85. What is the rule of the Court as regards taking annual rests in accounts between mortgagee and mortgagor? (159.)

86. What sums is a mortgagee entitled to add to his mortgage debt? What is a mortgagee's position who has, whilst in possession, expended money in improving the property, which expenditure has permanently added to the value of the property? (160.)

87. Is a mortgagee, in exercising his power of sale, under any obligation towards the mortgagor to use any care in the mode of selling? (161, 162.)

88. What do you understand by foreclosure? Under what circumstances will the Court re-open a foreclosure? (162, 163.)

89. What are the proper remedies of an equitable mortgagee to enforce his security against the mortgaged property? (164, 165.)

90. State shortly the rules of the Court as to the priorities of different mortgage securities, referring in your answer to the doctrine of "Tacking." (169-171.)

91. Define and explain the equitable doctrine of consolidation of mortgages. How has the doctrine been affected by the Conveyancing Act 1881? (172-174.)

92. A mortgagee sells and has in his hands a surplus beyond the amount of his mortgage. Can he claim to retain this surplus towards satisfaction of another debt the mortgagor owes him, and for which he holds no security? (174, 175.)

93. What is the position (*a*) of a mortgagor who pays off the mortgage but takes no reconveyance; (*b*) of a mortgagor whose mortgagee dies having first cancelled the mortgage? (175, 176.)

94. Enumerate and discuss the various disadvantages of a second mortgage. (176.)

Chapter VI.

95. Define and illustrate "Accident." (177.)

96. When will the Court relieve against (*a*) the defective execution of a power of appointment; (*b*) the non-execution of a power of appointment? (177-179.)

97. Define and illustrate "Mistake." Discuss generally the relief given by the Court in cases of mistake, distinguish-

ing in particular between mistakes of fact and of law. (181-187.)

98. Under what circumstances will the Court uphold a family compromise, or arrangement for the purpose of settling disputes? (187.)

99. Define Actual and Constructive Fraud respectively. When will a false representation amount to fraud? (189, 190.)

100. Is a vendor of land under any obligation to disclose defects to a purchaser? Is a purchaser of land bound to disclose to a vendor any facts he is aware of which renders the property more valuable than it appears to be? (190-192.)

101. Explain and illustrate the rule that when one of two innocent parties must suffer by the fraud of a third person, that party shall be the sufferer who has, however innocently, put it in the power of the third person to perpetrate the fraud. (194, 195.)

102. Explain and give an instance of each of the following constructive frauds:—(1) A marriage brokage contract; (2) a contract or condition in restraint of marriage; (3) a fraud on a marriage; (4) an agreement to influence a testator. (196, 197.)

103. In what way does the Court regard transactions entered into between persons occupying a position of influence or control, and those towards whom they occupy such position? (198-200.)

104. Can a solicitor (1) purchase from his client; (2) accept a gift from his client? (202-204.)

105. Apply the doctrine of constructive fraud to the following positions:—(1) Principals and agents; (2) promoters or directors of companies and shareholders; (3) guardians and wards; (4) parents and children. (204, 205.)

106. What relief is given by the Court to expectant heirs? How were the doctrines of the Court hereon affected by 31 Vict., c. 4? (206-209.)

107. What do you understand by a fraud on a power of appointment? What is meant by the excessive execution of a power? (210-212.)

108. Give a short statement of the past and present doctrines of the Court with regard to illusory and exclusive appointments under special powers. (212, 213.)

109. Is an agreement between two persons not to bid against each other at an auction good? (214.)

110. What is the law as to a vendor of land being sold by auction, fixing a reserved bid, or employing someone to bid for him? (214, 215.)

Chapter VII.

111. In what class of cases, and on what principle, will the Court usually decree specific performance of a contract? (217-221.)

112. When will the Court decree specific performance of an oral contract relating to land? (220, 221.)

113. Discuss the doctrine of part performance as regards specific performance of an oral contract relating to land. (221, 222.)

114. To what extent will a party be compelled to give effect to oral representations made by him of what he has done, or will do? Compare and discuss hereon the cases of Loffus v. Mawe, and Maddison v. Alderson. (223, 224.)

115. Explain and illustrate the rule, *Quisque renuntiare potest jure pro se introducto.* (225, 226.)

116. When will the Court allow evidence to be given of the subsequent oral variation of a written contract? Distinguish hereon between the position of a defendant who is seeking to set up the oral variation as a defence to an action for specific performance, and a plaintiff who is seeking specific performance of a written contract with such oral variation. (226, 227.)

117. In what cases will the Court decree specific performance of a contract relating to personal chattels? (227-229.)

118. To what extent does the Sale of Goods Act 1893 confer a power of granting specific performance of contracts for the sale of goods? (229.)

119. Will the Court decree specific performance of a contract entered into with an infant, either in his favour, or against him? (230.)

120. A enters into a contract to act exclusively at a certain theatre. B enters into a contract to supply C only, with certain goods which he manufactures, and not to sell to anyone else. Will the Court directly, or indirectly, decree specific performance of either of these contracts? (232.)

121. Can the Court decree specific performance of (*a*) a contract to build or repair; (*b*) a contract for the sale of the goodwill of a business? (233, 234.)

122. A enters into a contract for the sale of an estate, but is unable to make a title to the whole of it. Will the Court decree specific performance either in his favour or against him? (234, 235.)

123. A enters into an agreement to sell to B an estate at a price to be named by C. C dies without naming a price. D enters into an agreement to sell to E an estate for £10,000, and the crops and farming effects thereon at a price to be named by F. F dies without naming a price. Can the Court decree specific performance in either of these cases? (235.)

124. What has been the difference in the rules of Law and Equity with regard to time being of the essence of the contract? Which rule now prevails, and why? (236, 237.)

125. Give an example of a case in which the Court will not decree specific performance of a contract because

it would be morally wrong or inequitable to do so. (237, 238.)

126. A makes a voluntary settlement of a freehold estate on B. Notwithstanding this he contracts to sell the estate to C. What has hitherto been the rule of the Court with regard to decreeing specific performance of this contract either at the instance of, or against, C, and how is the matter now affected by the Voluntary Conveyances Act 1893? (238.)

127. What power has the Court of granting damages either in addition to, or instead of, decreeing specific performance? (239, 240.)

128. Has the Court any power, and if so upon what principle, to decree specific performance of a contract for the sale and purchase of land situate abroad? (240.)

129. To what extent, if at all, will the Court entertain the defence, in an action for specific performance, of the title being doubtful? (240, 241.)

130. What is provided by the Vendor and Purchaser Act 1874, with regard to the settlement of disputes between vendors and purchasers? Discuss, generally, the Court's powers on a summary application under this Act. (241, 242.)

131. When will the Court decree specific delivery of chattels irrespective of contract? In answering this question state what provision is contained in the Common Law Procedure Act 1854 bearing upon it. (242-244.)

Chapter VIII.

132. Give a short explanation of the origin of the jurisdiction of the Court of Chancery as regards the persons and estates of infants. (245.)

133. The father is the natural guardian of his children.

State under what circumstances the Court can deprive a father of this right of guardianship. (245, 246.)

134. What powers of appointing a guardian are conferred by the Guardianship of Infants Act 1886, and how may these powers be lost? (426, 247.)

135. What is the general rule of the Court as regards the religion in which a child is to be brought up? State when this rule is departed from. (252, 253.)

136. In what different ways may maintenance be obtained for an infant out of property to which he is entitled? Will the Court ever, in the absence of an express trust for maintenance, allow maintenance for an infant who has a father living, with whom he is residing? (254-257.)

137. Does the Court, in allowing maintenance for an infant require any account from the guardian as to the application of the amount allowed? (257.)

138. Who is a "Ward in Court?" State the general rule of the Court with regard to its wards. (257, 258.)

139. Has the Court any power (*a*) to restrain a ward marrying; (*b*) to compel a settlement of a ward's property? (259, 260.)

140. State shortly the provisions of the Infants Settlement Act 1855, with regard to marriage settlements by infants, and point out the exact effect of any settlement made under that Act. (260, 261.)

141. Has the Court any power to appoint a guardian to a child of foreign parents? Does it make any difference if such child has in fact a foreign guardian? (262.)

142. Explain in whom is vested jurisdiction as regards idiots and lunatics. (262, 263.)

Chapter IX.

143. In what different ways may partition be effected? (264, 265.)

144. Can the following persons maintain an action of partition :—(*a*) A joint tenant entitled in remainder; (*b*) a mortgagee of a joint tenant; (*c*) a person who claims to be entitled as a joint owner, but whose right depends on a point of doubtful construction of a will? (265, 266.)

145. What are the three main provisions of the Partition Act 1868? (266, 267.)

146. State shortly in what way the provisions of the Partition Act 1868 were amended by the Partition Act 1876. (268, 269.)

147. Under what circumstances may the Court in a partition suit direct a sale to take place out of Court? (270.)

148. What is the general rule as to how the costs of a partition suit are to be borne? (270, 271.)

149. Explain the nature of an action to settle boundaries, stating the origin of the Court's jurisdiction. (271.)

150. What is the modern practice of the Court in an action for the settlement of boundaries? (272.)

PART III.

Chapter I.

151. Define and instance the doctrine of Election. Explain shortly the reason of the doctrine. (273, 274.)

152. Whiteacre is limited to A for life with remainder to B in fee simple. B dies, and by his will devises Whiteacre to C, and bequeaths £1,000 to A. Explain the rights of A and C respectively. (273, 274.)

153 Explain and illustrate the statement, that compensation and not forfeiture is the doctrine in cases of election. (275, 276.)

154. A has a power to appoint a fund amongst the children of B, and in default of appointment the fund is given to C. A appoints to D (who is not a child of B), but

gives £1,000 of his own to the children of B. Explain the position and rights of the parties. State also what would have been the position if A in appointing to D had given £1,000 to C. (277.)

155. On a marriage a settlement is made whereby the husband settles property, and the wife, who is an infant, covenants to settle any after acquired property. The sanction of the Court under the Infants Settlement Act 1855 is not obtained. Is the covenant binding on the lady, or can she afterwards repudiate it? (277, 278.)

156. Exemplify the statement that parol evidence will not be admitted to raise a case of election. (279.)

157. In what way can a person signify that he elects? Discuss generally what will amount to an implied election. (279-281.)

158. Where a person is entitled to elect, what will be the position if he dies without making an election? (282, 283.)

159. How do (*a*) married women, (*b*) infants, and (*c*) lunatics elect? (283, 284.)

Chapter II.

160. Define the doctrine of Satisfaction, and distinguish it from the doctrine of Performance. (285.)

161. Explain shortly the principles acted on by the Court as regards the doctrine of Satisfaction in the case of children's portions. What is meant by putting oneself *in loco parentis?* (286-288.)

162. What difference, if any, is there as regards satisfaction in the case of portions to children, whether there is first a settlement and then a will, or first a will and then a settlement? (288-290.)

163. Give such an instance of satisfaction as will show the correctness of the statement, that the Court leans in

favour of satisfaction in the case of children's portions. (290, 291.)

164. Discuss the question of the admission of extrinsic evidence for the purpose of determining whether or not satisfaction takes place. (293-295.)

165. A by his will leaves £1,000 to his friend B, "for the purpose of buying him a business." Afterwards, opportunity occurring, A buys a business for B for more than this sum, but dies without altering his will. Can B claim the £1,000? (296.)

166. Under what circumstances is a legacy a satisfaction of a debt? If A, owing B £100, makes his will giving B a legacy of £100, and then pays the debt, but dies without altering his will, can B claim the legacy? (296, 297.)

167. Illustrate the rule that the Court leans against satisfaction of debts by legacies. Will a mere direction in a will that the testator's debts are to be paid, prevent a legacy operating in satisfaction of a debt? (298, 299.)

168. Is extrinsic evidence admissible for the purpose of showing that a legacy, though equal to or greater in amount than a debt the testator owed the legatee, was not intended to satisfy such debt? (299, 300.)

169. State the general rules of the Court as to whether, when more than one legacy is given to the same legatee, they are cumulative or substitutional. Is extrinsic evidence admissible on this point? (300-303.)

170. Illustrate the doctrine of Performance by reference to the cases of Lechmere v. Lechmere, and Blandy v. Widmore. Distinguish the decision in Blandy v. Widmore from that in Oliver v. Brickland. (303-307.)

Chapter III.

171. Define and explain shortly the doctrines of Conversion and Re-conversion respectively. (308, 309.)

172. Under what circumstances will a contract for the sale of land not effect a conversion? Will a notice to treat given by a railway company effect a conversion? (310-311.)

173. A makes a lease of freehold land to B for seven years, giving B during that period an option to purchase the land for a named sum. Discuss the effect of this option as regards the doctrine of conversion, in the event of A dying during the seven years, and before B has elected to purchase. (311-313.)

174. What must be the nature of a direction to invest money in land, or to sell land, for it to produce a conversion before anything is done under it? What difference is there as to the time from which a conversion takes place according to whether the direction to convert is contained in a deed or in a will? (315.)

175. Give shortly the decision in the leading case of Ackroyd v. Smithson, and explain the reason of the decision. (317, 318.)

176. Discuss the position and rights of parties as regards the quality in which property results on failure of objects for which conversion is directed. (319-321.)

177. What is the position as regards conversion in each of the following cases respectively:—(*a*) The Court in an administration action orders a fee simple estate, the property of A, an infant, to be sold. This is done, and the money is paid into Court, and A then dies under age leaving X his heir-at-law, and X, Y and Z his next-of-kin. (*b*) In a partition suit a freehold estate is sold and the share of A, an infant, is paid into Court. A dies under age leaving X his heir-at-law, and X, Y and Z his next-of-kin. (*c*) In lunacy proceedings a lunatic's property is sold and the lunatic then dies leaving X his heir, and X, Y and Z his next-of-kin? (322, 323.)

178. Where a conversion is directed in favour of two or more persons, can one of such persons re-convert without

the consent of the other or others? Distinguish in your answer between land directed to be sold, and money directed to be invested in land. (324.)

179. How may a re-conversion be effected? Explain the subject of re-conversion by operation of law. (325, 326.)

Chapter IV.

180. Give an instance of (*a*) apportionment of a benefit; (*b*) apportionment of a liability. If A pays a premium on being apprenticed, and then his master shortly afterwards dies, is there here any apportionment and return of a portion of the premium? (327, 328.)

181. What is the position with regard to each of the following paying off an incumbrance upon a settled estate:— (*a*) A tenant for life; (*b*) a tenant in tail in possession; (*c*) a tenant in tail in remainder? (329, 330.)

182. Is there any obligation on a tenant for life, or in tail, to keep down the interest on an incumbrance existing on the settled estate? (331.)

183. What is the general principle established by the case of Dering v. Earl of Winchelsea, as regards the right of contribution between sureties? (331.)

184. What differences formerly existed as regards contribution between sureties at Common Law, and in Equity respectively? When did these differences cease to exist? (331-333.)

Chapter V.

185. Give some short explanation of the origin of the Court's jurisdiction as regards giving relief against penalties and forfeitures, and the principle upon which it acts in so doing. (334-336.)

186. Will the Court relieve against (*a*) forfeitures by

copyhold tenants in acting contrary to custom; (*b*) forfeitures by leaseholders under conditions in leases? (336-338.)

187. State the general rules for determining whether a sum agreed to be paid on breach of covenant is to be considered as a penalty or as liquidated damages. Why is it important to observe the distinction between the two? (339, 340.)

188. A covenants for valuable consideration not to trade in a particular district, and further binds himself not to do so in a penalty of £1,000. B in his lease covenants not to plough up certain meadow land, and, if he does, binds himself to pay an additional rent of £5 an acre. Can A and B respectively, or either of them, avoid the covenant by paying what has been provided for? (341-343.)

Chapter VI.

189. State shortly the position of the husband as regards his wife's property at Common Law, and show how this position has been altered by statute. (343-345.)

190. What do you understand by a Fraud on the Husband's Marital Rights? Has the Married Women's Property Act 1882 at all affected the subject? (345-347.)

191. Explain the equitable doctrine of Separate Estate, and also the Anticipation Clause. (347-349.)

192. What is the effect of an absolute gift to a married woman of a sum of cash, or a sum of stock, the same being, however, expressed to be for her separate use without power of anticipation? (352, 353.)

193. A testator gives £10,000 consols to trustees in trust to pay the income to A during his life, and on his death absolutely for B, a married woman, for her separate use, without power of anticipation. What is the exact effect in this case of the anticipation clause? (354.)

194. In what way does the Conveyancing Act 1881

affect the anticipation clause? Explain and illustrate the enactment by reference to some cases decided under it. (354, 355.)

195. What was formerly the rule of the Court of Chancery as regards the liability of a married woman's separate estate for her debts and engagements, and also as to what separate estate would be liable? What is the rule on these points now, and state the authorities? (355, 356, 358.)

196. A single woman possessed of property incurs debts. She then marries, and settles the property on her marriage on herself for life without power of anticipation, then on her husband for life, and then on the children of the marriage. To what extent, if at all, have the *ante-nuptial* creditors any right against the property thus settled? (356.)

197. Explain and illustrate the statement that a married woman, in incurring a debt, does not incur any personal liability. (359.)

198. A married woman allows her husband to receive (*a*) the income of her separate property; (*b*) a portion of the capital of her separate estate. Does this amount to a gift to the husband, or has she any right to recover back the amounts so received by him? (359, 360.)

199. A married woman dies intestate possessed of real and personal estate which she held to her separate use. She leaves surviving her a husband and children. How does her property devolve? (360, 361.)

200. What do you understand by Pin-money? Can any arrears of pin-money be recovered? (361, 362.)

201. What is meant by a woman's Paraphernalia? Is it liable for the husband's debts? (362, 363.)

202. Explain the doctrine of a wife's Equity to a settlement. What was its origin? What points were decided in Lady Elibank v. Montolieu, and in Murray v. Lord Elibank respectively? (363-368.)

203. Point out why the doctrine of Equity to a settlement is not of as much importance now as was formerly the case. Give an instance of a case in which, however, it would still be necessary for a wife to assert this right. (365-368.)

204. What difference is there as regards enforcing the right of equity to a settlement against the husband and his specific assignees on the one hand, and his trustees in bankruptcy on the other? When the Court directs a settlement, what is the general rule as to the proportion of the property to be settled? (366, 367.)

205. In what different ways may a married woman lose or waive her equity to a settlement? (368.)

206. What do you understand by a wife's equitable right by survivorship? Explain how Malins' Act (20 & 21 Vict., c. 57) affects the subject. (368-370.)

207. Under what circumstances is a separation deed between husband and wife good? (371.)

Chapter VII.

208. What was meant by a Common Injunction? What is the proper course now to be taken when, notwithstanding that an order has been made for administration of the estate of a deceased person, or for the winding-up of a company, certain actions against the executor, or the company, are being proceeded with? (372-375.)

209. Give four instances of cases in which the Court will grant a special injunction. Has the Court any jurisdiction to grant an injunction restraining an application to Parliament? (376, 377.)

210. What was provided by the Judicature Act 1873, with regard to the granting of injunctions, and what is the effect of this provision? (377-379.)

211. Under what circumstances will the Court interfere, by injunction, to restrain a person being expelled from a club of which he is a member? (384.)

212. Under what circumstances will the Court grant an injunction restraining the publication of a libel? Can it grant such an injunction on an interlocutory application? (385, 386.)

213. Distinguish between (*a*) a Perpetual Injunction; (*b*) an Interlocutory Injunction; (*c*) an *Ex Parte* Injunction. (388.)

214. When will an *Ex Parte* Injunction be granted, and on what terms? (388.)

215. What is a writ of *Ne exeat regno?* What must now be proved for such a writ to be issued? (388, 389.)

Chapter VIII.

216. What do you understand by an action to perpetuate testimony? (390, 391.)

217. What was a bill to take evidence *de bene esse?* Explain how such a proceeding became obsolete. (391, 392.)

218. What was a bill for discovery? Explain how such a proceeding became obsolete. (392, 393.)

219. What is meant by an action to establish a will, and when would this be the proper course to pursue? (393, 394.)

220. What do you understand by an action in the nature of a bill of peace? Give two instances in which such an action might be maintained. What is the reason of the Court entertaining an action of this character? (394-396.)

IV.—DIGEST OF QUESTIONS AND ANSWERS.

1. Equity Generally, The Maxims, and the Judicature Acts.

Q. What is the meaning of the term "Equity?"

A. By Equity is meant that portion of justice not originally recognised at Common Law, yet not existing in opposition to it, but rather following it so far as consistent with justice, and administered where Courts of Common Law could not give the necessary relief, or at least without circuity of action or multiplicity of suits. (Indermaur's Equity, 6.)

Q. Trace concisely the reasons which led to the establishment and growth of the Jurisdiction of the Court of Chancery.

A. The rules of the Common Law were developed into a positive and inflexible system at an early date; the Roman law was discouraged and deprived of all authority in Common Law Courts; the defects of the Common Law procedure, which required each action to be commenced by a special writ and refused relief to a suitor who chose the wrong writ or could not find a suitable writ; the failure of the statute *in consimili casu* which empowered new writs to be devised, because the judges were jealous of such innovations and because new defences also arose; the disregard paid by the Common Law to uses; the practice of petitioning the king in council for relief, and the ordinance of Edward III. referring all cases of grace to the Chancellor. (See Indermaur's Equity, 1-5.)

Q. What do you understand by the "Maxims of Equity?"

A. They are certain maxims or doctrines which have

been laid down from time to time by eminent judges of the Court of Chancery, chiefly by Lord Bacon, the Earl of Nottingham, and Lord Hardwicke. The Earl of Nottingham in particular has been styled the "Father of Equity." These maxims form the ground work or foundation of the whole system of Equity jurisprudence. (Indermaur's Equity, 4, 5.)

Q. Explain and illustrate the maxim "Æquitas sequitur legem." Can this maxim be reconciled with the enactment that "in matters where there is a variance between the rules of Equity and the rules of Common Law, the rules of Equity shall prevail?"

A. It means (1) that a legal right, estate, or limitation receives precisely the same construction in a Court of Equity as in a Court of Law. Thus, words which in a Court of Law give a legal estate tail, under the rule in Shelley's case, receive the same construction in Equity; (2) that an equitable right, estate, or limitation is construed in the same way as a Court of Law would construe it if it were legal instead of equitable, *e.g.*, in executed trusts, the rule in Shelley's case applies—but, in dealing with executory trusts, Equity gives effect to the intention of the parties rather than the words used. The maxim can be thus reconciled, for it has never been of absolute application in all cases, and it often happened that Equity, while following the law, went further and mitigated its harshness by allowing an equitable right where the legal right had ceased, *e.g.*, redemption of a mortgage. (Indermaur's Equity, 8.)

Q. Give an example of the maxim "Equity considers as done that which ought to be done."

A. An example is found in the doctrine of Conversion under which when real property is directed to be sold, or personal property is directed to be invested in land, it is forthwith treated as of that nature into which it is so directed to be changed. (Fletcher v. Ashburner, 1 Wh. & Tu., 968.)

Q. Trace the importance in the history of the Court of Chancery of the rule that Equity acts in personam. Illustrate by reference to cases.

A. This is a maxim of Equity which is principally, if not exclusively, descriptive of the procedure in a Court of Equity, and is not otherwise a maxim or principle of Equity itself. In the case of Penn v. Lord Baltimore (2 Wh. & Tu., 1047), which was a suit regarding land in America, Lord Chancellor Hardwicke stated in effect as follows:—"The strict primary decree in this Court, as a Court of Equity, is *in personam;* and although this Court cannot (in the case of lands situate without the jurisdiction of the Court) issue execution *in rem, e.g.*, by elegit, still I can enforce the *personam, e.g.*, by attachment of the person when the person judgment of the Court, which is *in personam* by process *in* is within the jurisdiction, and also by sequestration so far as there are goods and lands of the defendant within the jurisdiction of the Court, until he do comply with the order or judgment of the Court, *which is against himself personally to do or cause to be done or abstain from doing some act.*" In accordance with this the Court is in the habit of entertaining actions for accounts, &c., rents and profits, and specific performance and injunctions (Mercantile Investment Co. v. River Plate Co., 61 L. J., Ch., 473), and for foreclosure of mortgages, &c. (Toller v. Carteret, 2 Vern., 494), regarding lands situate abroad provided that the title to the lands is not in question. This maxim was also the foundation of the jurisdiction of equity to restrain actions at law by a common injunction. (Indermaur's Equity, 19, 20.)

Q. Explain and illustrate the statement that Equity acts in personam. Does this principle apply to the foreclosure of a mortgage?

A. A Court of Equity may, where a person against whom relief is sought is within the jurisdiction, make decrees upon the ground of a contract or any equity subsisting between

the parties respecting property situate out of the jurisdiction, and can enforce such decree by attachment of the person and sequestration of his property within the jurisdiction. Thus in Penn v. Lord Baltimore, equity decreed specific performance of a contract made in England as to the boundaries of two provinces in America. It does apply because a decree for foreclosure is a decree *in personam*. (2 Wh. & Tu., 1063, 1067.)

Q. What exactly is meant by saying that Equity will not interfere against a purchaser for value without notice? Have the Judicature Acts made any difference as to the right to discovery against such purchasers?

A. It means that Equity pays respect to the defence of a *bonâ fide* purchaser for value to the extent that the Court will not give any assistance against a person occupying that position beyond what could be obtained against him at Common Law. Thus, before the Judicature Acts, the Court of Chancery refused to give discovery, as against a *bonâ fide* purchaser for value, it being then a relief peculiar to Equity (Basset v. Nosworthy, 2 Wh. & Tu., 1); but discovery can now in all cases be obtained by an interlocutory application in the action. (Ind v. Emmerson, 12 App. Cas., 300; Indermaur's Equity, 14, 15.)

Q. When there are successive equitable charges to different persons on the same property, on what principles will Equity determine whether or not they shall rank merely in order of their respective dates? Give instances.

A. They will rank in the order of their respective dates, the rule being *Qui prior est tempore potior est jure*, unless there are circumstances giving some superior equity, or right in point of conscience. (Indermaur's Equity, 12-14.)

Q. A holds £1,000 railway stock in trust for B. Who is entitled to the stock in the following cases?—(a) *B executes an assignment of his equitable interest to C, who does not give notice; B then executes an assignment of it to D, who gives*

notice to A. Value is given in both cases. (b) *A transfers the stock to Z, who has no notice of the trust.* (c) *A deposits the certificates with his bankers to secure an overdraft.* (d) *B dies intestate, and leaves no widow or next-of-kin.*

A. (*a*) D is entitled, assuming that he took without notice of C's rights; for D, by giving notice first to A, has by his greater diligence acquired a right *in rem* to the stock as distinguished from rights *in personam* against B. This is known as the rule in Dearle v. Hall (2 Wh. & Tu., 849). (*b*) If Z takes for value, he is entitled on the principle that when the equities are equal the law will prevail; but if Z is a volunteer, he is in the same position as A (Indermaur's Equity, 10). (*c*) B has priority, because *qui prior est tempore potior est jure* (*ibid*). (*d*) The Crown is entitled.

Q. Explain the phrases:—Executory trust; equitable waste; conversion; equity to a settlement; tacking mortgages. Give illustrations.

A. By an *executory trust* is meant a trust which is inchoate and incomplete, and not fully and finally declared (Lord Glenorchy v. Bosville, 1 Wh. & Tu., 1). By *equitable waste* is meant waste in respect of which there was before the Judicature Acts only a remedy in Equity, *e.g.*, a tenant for life whose estate is granted to him without impeachment for waste cutting down ornamental timber (Garth v. Cotton, 1 Wh. & Tu., 806). By *conversion* is meant that change in the nature of property whereby, for certain purposes, real estate is considered as personal, and personal as real, and transmissible and descendible as such (Fletcher v. Ashburner, 1 Wh. & Tu., 968). By *equity to a settlement* is meant the right of a married woman to go to the Court and get a settlement out of property which would otherwise be taken by her husband (Lady Elibank v. Montolieu, 1 Wh. & Tu., 486). By *tacking* is meant the uniting of two incumbrances with a view to squeezing out an intervening one prior in

point of time to the security tacked. (Marsh v. Lee, 1 Wh. & Tu., 696.)

Q. How far is it correct to say that the distinction between Law and Equity was abolished by the Judicature Acts? State the general effect of what was done in this direction.

A. The Judicature Acts did not absolutely abolish the difference between Law and Equity, but merely provided that they should be administered concurrently by the High Court and the Court of Appeal, and that these Courts shall recognise and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities, in the same manner in which the Court of Chancery would formerly have done. It was also provided that in all cases of a conflict between the rules of Law and Equity, those of Equity should prevail. Certain matters also which formerly Equity alone had cognizance of were exclusively assigned to the Court of Chancery. (Indermaur's Equity, 24-26.)

Q. Have the Judicature Acts abolished the distinction between legal and equitable rights? Give reasons for, and illustrate, your answer. A trader gave a mortgage to A by bill of sale of his future stock-in-trade. Before A took possession he pawned some of it to B, who had no notice of A's charge. Had B a good title against A?

A. It was provided by the Judicature Act 1873 (secs. 24, 25) that the Supreme Court should administer Law and Equity concurrently, and notice and give effect to equitable estates, rights, and defences, &c., in the same way that the Court of Chancery would formerly have done; and that in all cases where there had been a conflict between the rules of Law and Equity, the rules of Equity should thenceforth prevail. Here B would have the better title on the principle that where the equities are equal the law shall prevail, for apart from statute law the assignment to A only gives A an equitable right to specific performance, and B has been more

diligent, took innocently, and has acquired a legal possession and a qualified legal ownership ; further, by the Bills of Sale Act 1882, sec. 5, the assignment to A is expressly declared void except as between the trader and A. (Indermaur's Equity, 26, 9-15.)

Q. Summarize the provisions of the Judicature Acts for the "fusion of Law and Equity."

A. Under these Acts the previously existing Courts are now moulded into one, called the Supreme Court of Judicature, consisting of two parts, viz. : The High Court of Justice and Her Majesty's Court of Appeal. The High Court is divided into (1) The Chancery Division, (2) The Queen's Bench Division, (3) The Probate Divorce and Admiralty Division, and in the first of these divisions are specially meant to be considered and adjudicated upon all such matters as were formerly specially dealt with in the Court of Chancery. It is enacted that the High Court and the Court of Appeal shall recognise all equitable estates, rights and titles in the same way in which the Court of Chancery would formerly have done, and that in cases in which there was formerly a conflict between the rules of Law and Equity, the rules of Equity shall prevail. (Indermaur's Equity, 24-26.)

Q. Explain the provisions of the Judicature Acts on the following subjects :—Merger ; waste ; assignment of choses in action ; the rights of secured and unsecured creditors of insolvent estates ; injunctions to restrain actions.

A. No merger shall take place by operation of Law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in Equity (Judicature Act 1873, sec. 25, sub-sec. 4). An estate for life without impeachment of waste shall not confer on the tenant for life any legal right to commit equitable waste, unless it shall expressly so appear from the instrument creating such estate (*ibid*, sub-sec. 3). Any absolute assignment by writing signed by the assignor, of any legal choses in action,

with express notice in writing to the debtor, &c., shall pass the legal right and all legal remedies (*ibid*, sub-sec. 6). In the administration by the Court of the estate of a deceased insolvent, the same rules shall prevail as to the respective rights of secured and unsecured creditors, and as to the kind of debts and liabilities provable, and the mode of valuing contingent liabilities, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt (Judicature Act 1875, sec. 10). No one division of the High Court can restrain proceedings in another division. (Judicature Act 1873, sec. 24 (5).)

Q. Explain the law of merger. What alteration was made by the Judicature Act?

A. By merger is meant that when a greater and a less estate come into the hands of one person, the less is swallowed up in the greater. Thus if A has a life estate in Whiteacre and B has the remainder in fee, and A buys up B's remainder, A has an estate in fee simple in possession. The Judicature Act 1873 (sec. 25, sub-sec. 4), now provides that no merger shall take place by operation of Law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in Equity.

Q. What is equitable waste?

A. Such acts as at Law did not constitute waste but did in Equity. Where an estate was granted to A for life without impeachment for waste, with remainder over, at Law A was entitled to commit all acts of waste; but the Court of Chancery would not permit him to commit such gross acts of waste as cutting down ornamental timber, or pulling down the family mansion house. Thus there was a conflict between the rules of Law and Equity, and the equitable rule now, under the provisions of the Judicature Act 1873, prevails, it being specially provided that a grant without impeachment for waste shall not be deemed to have conferred any right, even at Law, to commit waste, known as equitable waste. (See notes

to Garth v. Cotton, in Indermaur's Conveyancing and Equity Cases, 7th edition, 6, 7.)

Q. Name some matters which are especially assigned to the Chancery Division by the Judicature Acts?

A. Generally it may be stated that all those matters which were formerly within the exclusive jurisdiction of the old Court of Chancery are now assigned to the Chancery Division. Particularly may be mentioned administration of estates of deceased persons, dissolution of partnership, redemption and foreclosure of mortgages, execution of trusts, specific performance, and partition. (Indermaur's Equity, 25.)

2. Trusts and Trustees.

Q. Define and classify trusts.

A. A trust may be defined as an obligation under which a person in whom property is vested, is bound to deal with or to supervise the dealing with the beneficial interest in that property in a particular manner, and for a particular purpose, either wholly in favour of another or others, or partially in favour of another or others conjointly with himself. Trusts may be classified as being (1) express trusts, (2) implied trusts, (3) constructive trusts. (Indermaur's Equity, 27.)

Q. What is necessary to constitute an express trust (a) *of real estate;* (b) *of personal estate? When is writing necessary, and when is it not necessary?*

A. To create an express trust, the subject matter of the trust and the way in which it is to be dealt with must be clearly pointed out, and the words used must be imperative and not discretionary. As regards real and leasehold property the trust must be in writing and signed under the 7th section of the Statute of Frauds; but as regards purely personal property the trust may be created by word of mouth. Any

assignment of an existing trust must however be in writing by the 9th section of the Statute of Frauds. (Indermaur's Equity, 31, 32.)

Q. Having regard to the Statute of Frauds, what is sufficient evidence of a trust of real estate? It is said that "in cases of charitable trusts a greater latitude of construction is allowed than in ordinary trusts." Illustrate this.

A. To create a trust of real estate writing is absolutely necessary (29 Car. II., c. 3, sec. 7). This enactment, however, does not apply to trusts of real estate arising merely by implication or construction of law. The latitude shown by the Court, as regards charitable trusts, is well illustrated by the *cy-près* doctrine, which is, that if a testator has created a charitable trust which fails, but has shown a general charitable intention, the idea of the trust will be carried out as nearly as possible, and will not be allowed to fail as would be the case were a private individual concerned, and not a charity (Biscoe v. Jackson, 35 Ch. D., 460). (Indermaur's Equity, 32, 56.)

Q. A bequeaths £1,000 to B by will, and tells B verbally that he is to hold the money in trust for a fever hospital, and B agrees to do so. C is appointed executor, but the will contains no other provisions. Who is entitled to the £1,000? and what must the party so entitled do to obtain payment?

A. This is a case of a secret trust. Assuming the facts stated in the question are all capable of proof, or are admitted by B, the hospital is entitled to sue for a declaration that B holds in trust for them, and that he must carry out the trust. (Indermaur's Equity, 42-44.)

Q. Distinguish a trust infringing the rule against perpetuities from one infringing the statutory limits of accumulation. What, in the latter case, becomes of income for the period for which the trust for accumulation exceeds those limits?

A. A trust infringing the law against perpetuities is one where the property, the subject of the trust, is itself tied up in

such a way as to withdraw it from ordinary transferability for a period of time exceeding that allowed by the rule laid down in Cadell v. Palmer (Indermaur's Conveyancing and Equity Cases, 23). A trust infringing the statutory limits of accumulation is where the income of property is directed to be accumulated for a period which merely exceeds that allowed by the Thellusson Act (39 & 40 Geo. III., c. 98). The income for the period for which the trust for accumulations exceeds those limits goes to such person or persons as would have been entitled thereto if no accumulation had been directed. (Weatherall v. Thornburgh, 8 Ch. D., 261.)

Q. Explain, and illustrate by cases, the law as to executory trusts. What difference exists between executory trusts arising out of ante-nuptial agreements and out of wills?

A. Executory trusts are always valid if by will or by instrument *inter vivos* for value; but if created by an instrument *inter vivos* without value then they are not enforced. An executory trust is primarily construed in the same way as an executed trust, for Equity follows the Law, but the Court does not hesitate to depart from this strict construction, and to follow the party's intention when such intention can be perceived. The well-known case of Lord Glenorchy v. Bosville (1 Wh. & Tu., 1) furnishes a good illustration. There is often a material distinction in the case of executory trusts arising in marriage articles and wills respectively, for in the former you have the intention from the very nature and well-known design of the instrument, whilst in the latter you can only gain the intention from the actual words used. (Indermaur's Equity, 41, 42.)

Q. What is the effect of incompleteness in the execution of a voluntary settlement or gift? Give instances of such incompleteness, distinguishing the cases where what was intended was a transfer by the donor, from cases where he meant to be a trustee for the beneficiary?

A. The effect of incompleteness in the execution of a

voluntary settlement or gift is that the settlor or donor can draw back from it, and the Court will always refuse to decree specific performance. A voluntary trust, to be binding, must be a perfect trust (Ellison v. Ellison, 1 Wh. & Tu., 291). Instances of such incompleteness are to be found in Jefferys v. Jefferys (Cr. & Ph., 138) and in Antrobus v. Smith (12 Ves., 39). In the latter case a father desiring that his daughter should have a certain share in a company indorsed upon a receipt a memorandum as follows: "I hereby assign to my daughter all my right, title, and interest," &c., &c. It was held that this was only an imperfect gift, and could not be enforced by the daughter. But, if the father had simply declared himself a trustee for his daughter, a perfect trust being created, the gift would have been good. (Indermaur's Equity, 33, 34.)

Q. Explain, and illustrate by cases, the law as to what is requisite to constitute such a voluntary gift or settlement as would be enforced by the Court.

A. It must be complete, or else the giver of the benefit must have plainly declared himself a trustee. If any voluntary trust, gift, or assignment is incomplete, the Court will not give effect to it (Ellison v. Ellison, 1 Wh. & Tu., 291). The case of Jefferys v. Jefferys (Cr. & Ph., 138) is a good illustration of the necessity of a voluntary trust being complete, and the case of Antrobus v. Smith (12 Ves., 39), is a good illustration of the necessity of a gift or assignment being complete. (Indermaur's Equity, 33, 34.)

Q. A assigned certain funds by deed to B, on certain trusts for C, with no expressed powers of revocation. C was not informed of the transaction. A subsequently destroyed or lost the deed. Has C on hearing of the matter any remedy?

A. Assuming the assignment was complete, C acquired perfect rights under it, and may take proceedings to have the benefit of the assignment. A trust, though voluntary,

is, if complete, irrevocable, if there is no power of revocation reserved by the instrument. (Indermaur's Equity, 34.)

Q. When may voluntary trusts be avoided or set aside (a) *under Statute;* (b) *by rules of Equity?*

A. (*a*) Under 13 Eliz., c. 5, if they constitute frauds on creditors ; and also under the Bankruptcy Act 1883, in case of bankruptcy within two years, and even within ten years, unless the parties claiming under the settlement can show the settlor was solvent when he made it. Formerly also, under 27 Eliz., c. 4, a voluntary trust of land would be defeated by a subsequent sale for value, but this is not so now since the Voluntary Conveyances Act 1893. (*b*) If obtained by fraud or undue influence, or made under mistake, or if the object of the trust had ceased to exist, or if in favour of creditors, and not communicated to them. (Indermaur's Equity, 35, 36.)

Q. Compare and contrast the Statutes 13 *Eliz., c.* 5, *and* 27 *Eliz., c.* 4, *for the avoidance of fraudulent dispositions of property, and explain the object of the Voluntary Conveyances Act* 1893.

A. 13 Eliz., c. 5, provided that all dispositions of both realty and personalty made for the purpose of defeating creditors, should be void unless made *bonâ fide* for value. 27 Eliz., c. 4, provided that all voluntary dispositions of land should be void against a subsequent *bonâ fide* purchaser for value. This was altered by the Voluntary Conveyances Act 1893, which provides that no voluntary conveyance of land, if made *bonâ fide* and without any fraudulent intent, shall be void against a purchaser for value who takes since 29th June, 1893. (Indermaur's Equity, 35, 36.)

Q. Define and illustrate Implied and Constructive Trusts respectively?

A. An implied trust may be defined as one founded upon an unexpressed but presumable intention, *e.g.*, A pays the purchase-money of property and takes a conveyance in the

name of B, here B will generally be held to be a trustee for A. (See Dyer v. Dyer, 1 Wh. & Tu., 236.) A constructive trust may be defined as one raised by construction of equity, to satisfy the demands of justice, without reference to any presumable intention, *e.g.*, where a trustee makes a profit out of his trust estate, he will be bound to account for such profit to his *cestui que trust.* (See Keech v. Sandford, 1 Wh. & Tu., 53.)

Q. Land is conveyed by X to A and his heirs by the direction of B, who pays the purchase-money. B dies intestate, leaving a widow and one son. Who is entitled to the land?

A. Dyer v. Dyer (1 Wh. & Tu., 236) shows that if A is a stranger he only takes as a trustee for B, but if a wife or child, unprovided for, that then generally he or she will take beneficially, it being presumed to be an advancement. Assuming that A was a stranger B's son will take subject to the widow's dower. (Indermaur's Equity, 45.)

Q. When a wife joins her husband in mortgaging, what equitable presumptions arise, and what rights has she or her representatives against the husband or his representatives? What effect has the "Married Women's Property Act 1882*" on the doctrine?*

A. As decided in Huntingdon v. Huntingdon (2 Wh. & Tu., 1141), the Court presumes that the wife simply charged her estate as surety for her husband, and that she or her representatives are to have the estate back again free from the mortgage. In cases coming within the Married Women's Property Act 1882, there is now no need for the husband to join in a mortgage of the wife's property, so that there will now ordinarily be nothing on the face of the mortgage to raise the presumption of the wife's estate being but as surety for her husband's debts, though, of course, parol evidence could be given to shew that this was so, and that being shewn then no doubt the general rule of suretyship prevails. (Indermaur's Equity, 50; and see *Re* Marlborough, Davis v. Whitehead, *Law Students' Journal*, April, 1894, p. 76.)

Q. What is meant by a power in the nature of a trust? If residue be bequeathed to such of the testator's nearest relations as A shall appoint, to whom may he appoint? Would the effect be different if the words were "to my nearest relations in such shares as A may appoint?" To whom, and in what shares, will the property in each case go if A makes no appointment?

A. A power in the nature of a trust arises where there is a general intention in favour of a class, and a particular intention in favour of individuals of that class to be selected by the donee of the power. Here, if the donee fails to make any selection, and there is no gift over in default of appointment the members of the class will take share and share alike (Burrough v. Philcox, 5 My. & C., 72). A may appoint, in the first case, to relations who are not next-of-kin, for he has a power of selection; but in the second case A can only appoint to next-of-kin, for he merely has a power of distribution (2 Wh. & Tu., 1103). In default of appointment the property will go, in the first case, to the whole class of the testator's nearest relations equally, and the representatives of those members of the class who die in A's lifetime will take their deceased's share (Lambert v. Thwaites, 2 L. R. Eq., 151); and in the second case the result will be exactly the same (Pope v. Whitcombe, 3 Mer., 689) because although A might have distributed the funds unequally, the Court interposing on his default divides the funds equally. (2 Wh. & Tu., 1101, 1102.)

Q. Define and give an instance of a resulting trust?

A. A resulting trust is in the nature of an implied trust, and arises where the objects of a trust fail, and therefore the property the subject of the trust comes home again to the creator. Thus, A settles property on B in trust for C, who turns out was dead at the time, and the consequence is that B holds for A. (Indermaur's Equity, 47, 48.)

Q. Give instances of different kinds of constructive trusts. A will bequeathed renewable leaseholds to A for life, remainder

to B. A bought the freehold reversion. How does the freehold devolve on A's death?

A. Instances would be (*a*) a trustee making directly or indirectly a profit out of his trust estate (Keech v. Sandford, 1 Wh. & Tu., 53); (*b*) a vendor's lien for unpaid purchase-money (Mackreth v. Symons, 1 Wh. & Tu., 355). As the testator has shown an intention that the leaseholds should be renewed, the freehold on A's death will devolve on his heir or devisee, as the case may be, subject to the right of B to have the leaseholds renewed for the term for which they are capable of being renewed. The heir or devisee will thus be a constructive trustee to this extent for B. (Indermaur's Equity, 51, 52; Lewin on Trusts, 404.)

Q. State the general object, and mention the principal provisions, of the Trustee Act 1893.

A. This Act was passed to consolidate previous statutory provisions on the Law of Trusts contained in a variety of statutes. (See Epitome of the Act, *ante*, p. 7.)

Q. How may a new trustee be appointed if the existing trustee dies? And how would you vest the property in mortgages, consols, and freeholds?

A. A new trustee may be appointed by the person nominated for that purpose by the trust instrument, and if no such person, by the last surviving or continuing trustee or the executors or administrators of the last-surviving or continuing trustee. As regards the freeholds they would be vested by means of a declaration inserted in the deed of appointment. The mortgages and the consols would, however, have to be transferred in the ordinary manner. (Trustee Act 1893, secs. 10, 12.)

Q. A is the surviving trustee of a will which contains no power to appoint new trustees. What must be done on A's death to appoint new trustees and vest the trust property in them? The trust estate consists of £1,000 *lent on mortgage of freeholds,* £1,000 *Consols,* £1,000 *Brighton Railway Stock, a*

copyhold farm, £1,000 due on a promissory note, and a leasehold house and some furniture.

A. By the Trustee Act 1893 (sec. 10) the personal representative of A can appoint new trustees by signed writing. A deed should be employed, and should contain a declaration that the trust property is to vest in the new trustees, as this will operate as a conveyance (under Section 12) to them of the money due on the promissory note, the leasehold house, and the furniture. But the mortgage must be conveyed by separate deed of transfer; the Consols by signature of the books at the Bank of England; the railway stock by deed of transfer registered with the company; and the copyholds by surrender and admittance.

Q. B, the sole trustee for A's children under a settlement comprising leasehold, freehold and copyhold lands held on trust for sale, £1,000 Consols, and a sum of money due on a promissory note goes abroad and cannot be found. What must the beneficiaries do to obtain a sale and division of the property? A has three children, one of whom was a daughter married in 1883.

A. Assuming that the trustee has been abroad for more than a year, a new trustee may be appointed under the Trustee Act 1893 (sec. 10), provided that there is a person named in the deed to appoint new trustees. The leaseholds and freeholds and the money can be made to vest in the new trustee by declaration under Section 12 of this Act, but as regards the copyholds a vesting order must be obtained. If the provision of Section 10 does not, however, apply, a summons must be taken out under the Trustee Act 1893 (secs. 25, 26), for the appointment of a new trustee and for a vesting order. A new trustee being appointed, and the property duly vested in him, the sale can take place. If all the children are *sui juris* they could make a good title without the appointment of a new trustee. As regards the daughter, she, being married since 1882, her husband would not

have to join. A vesting order would, however, have to be obtained.

Q. How can a trustee retire without appointing a new trustee in his place? The trust property consists of freeholds, copyholds, leaseholds, mortgage debts, furniture and consols. What must be done to vest these respectively in the continuing rustees?

A. He may under the Trustee Act 1893 (sec. 11), retire with the consent of his co-trustees, and such other person, if any, as is empowered to appoint new trustees if there will still be left two trustees. The matter must be carried out by deed. Under Section 12 a declaration in the deed will be all that is necessary as regards the freeholds, leaseholds and furniture; but copyholds, mortgages, and stocks are excepted, and must be transferred in the ordinary way.

Q. In what respect did the Wills Act alter the general rules of Equity under which the trustees' estate commonly determined when their intervention was no longer necessary?

A. Formerly, when it was not specified in the will what estate the trustees were to take, they would have taken merely such an estate as was necessary for the purposes of the trust; but now, under the 30th and 31st sections of the Act (1 Vict., c. 26), when there is a devise to trustees without words of limitation, they take either an estate determinable on the life of a person taking a benefical life interest in the property, or if the trust may endure beyond such life, then they take the fee simple.

Q. Are there any, and if so what, circumstances under which a trustee may claim remuneration for services performed in relation to the trust?

A. Yes, he may do so:—(1) Where he is expressly authorised by the trust instrument to make charges for his services. (2) Where at the time of accepting the trust he expressly stipulated with beneficiaries who were *sui juris* for a remuneration, and there was no unfair pressure on his part. (3) Where the Court has expressly allowed remunera-

tion. (4) Where the trust property is abroad, and it is the custom of the local Courts to allow remuneration. (Indermaur's Equity, 81.)

Q. State and illustrate the rules of law as to the reimbursement and remuneration of trustees.

A. A trustee is entitled to be reimbursed all expenses which he has properly incurred in the execution of the trust, and as between the beneficiaries these are generally out of the capital, but until payment the trustee has a lien on both capital and income. If the trustee has committed a breach of trust he must make that good before he is reimbursed. A trustee is not entitled to remuneration for his services unless the trust instrument expressly gives it to him, or he bargains for it before he accepts the trust, or where the Court expressly allows it, or he is managing property abroad and the local custom allows it. (Indermaur's Equity, 81.)

Q. State and discuss, referring to modern cases, the rule in Howe v. *Lord Dartmouth. How may the rule be excluded?*

A. Where personal property, being either of a wasting nature, or of a kind not yielding a present income, is given in trust as a whole and not specifically for one for life with remainders over, it is to be converted and properly invested, so that thus, for instance, short leaseholds may be preserved for the remainderman, and the tenant for life may gain a benefit from reversionary property. The rule does not apply if the property is given specifically, nor where there is an express direction for sale at a particular period, *e.g.*, an express trust to convert at the death of the tenant for life, for this will entitle him to specific enjoyment (Alcock v. Sloper, 2 M. & K., 699), nor where the trustees have special power to retain existing investments if they should think fit (Gray v. Siggers, 49 L. J., Ch., 819). (Indermaur's Equity, 62-64; 2 Wh. & Tu., 321, 336-344.)

Q. Two landed estates, A and B, were devised to trustees upon trust for immediate sale and for investment of sale

moneys, and for payment of income of investments to a tenant for life, and for transfer (on his death) of the investments absolutely to a remainderman. The trustees neglected to sell, but paid to the tenant for life the income of the estate A, which was more than the interest on investment of its sale moneys would have been. Estate B was vacant land, producing no income during the life of the tenant for life. On the death of the tenant for life, the capital value of each estate was not less than at the testator's death. What are the rights of the remainderman or the liability of the trustees in respect of excessive payments from Estate A to the tenant for life?

A. The trustees are guilty of a breach of trust by disobeying the trust for immediate sale and investment, and the remainderman can hold them liable for this. The remainderman is entitled to demand from the trustees the amount of consols that could have been bought had the two estates been sold at the end of a year from the death (which may be a very different sum to that which the same money would purchase now), and they can call upon the trustees to pay them the excess of the income derived from the two estates during the life of the tenant for life beyond the dividends upon those consols; the trustees are then entitled to be recouped by the tenant for life, or as he is dead, by his estate, so far as such excess income is concerned. (2 Wh. & Tu., 346; Indermaur's Equity, 62.)

Q. A is a trustee of a will, and invests trust moneys on mortgage of land and buildings, and on railway debentures. The securities turn out insufficient. In what circumstances would A be liable to make good the loss?

A. He will be liable if he was prohibited from investing in such securities, or if he has not exercised all proper precautions. Assuming he is not prohibited, still he will be liable as regards the debentures unless the railway company had during each of the 10 years past before the date of investment paid a dividend of not less than £3 per cent. per

annum on its ordinary stock (Trustee Act 1893, sec. 1). As regards the mortgages he will be liable unless he has had a report of a surveyor as indicated by the Trustee Act 1893, and has not advanced more than two-thirds of the reported value. If he has advanced more than two-thirds, he will be liable for any excess he has advanced beyond that amount. (Indermaur's Equity, 71.)

Q. A, being trustee of a will, invests trust money on a mortgage which turns out to be a deficient security. Under what circumstances will A be liable for the loss? When, and to what extent, can a trustee so liable claim to be recouped by a beneficiary the amount which he has been called on to pay?

A. A will be liable unless he has acted in the manner pointed out by the Trustee Act 1893, under which he will not be liable if he has had the property properly valued, and the valuer has advised an advance, and he has not lent more than two-thirds of such value. If so liable, he is only responsible in respect of any excess that he has advanced over the two-thirds. Under the same Act he would be entitled to be recouped out of the particular beneficiary's interest, if he has made the advance with the consent in writing of the beneficiary, or at his instigation, or request. (Indermaur's Equity, 70, 71, 85.)

Q. A trustee is held liable for loss caused by a breach of trust. Under what circumstances has he any remedy over (a) *against a co-trustee;* (b) *against a cestui que trust?*

A. (*a*) If the breach of trust does not amount to actual fraud, a trustee who has had to refund a loss is entitled to contribution from his co-trustee (Indermaur's Equity, 80). (*b*) The Trustee Act 1893 (sec. 45), provides that where a trustee commits a breach of trust, at the instigation, or request, or with the consent in writing of a beneficiary, the Court may, even if the beneficiary is a married woman without power to anticipate, impound all or any part of the beneficiary's interest to indemnify the trustee. (*Ib.*, 85.)

Q. If a trustee by request of a cestui que trust commits a breach of trust, what right of indemnity has he? Where trustees are jointly and severally liable for a breach of trust, can one of them, as between himself and the others, claim in any and what case to be indemnified by them?

A. By Section 45 of the Trustee Act 1893, where the breach was committed at the instigation or request, or with the consent in writing, of a beneficiary, the Court may impound all or any part of the beneficiary's interest to indemnify the trustee (or any person claiming through him), even though the beneficiary is a married woman entitled for her separate use without power of anticipation. He is entitled to contribution, except in the case of actual fraud, or where he has got the benefit of the breach of trust, or where he was the confidential legal adviser of the others. (Indermaur's Equity, 80, 85.)

Q. To what extent is a trustee liable for a breach of trust committed (a) *by a co-trustee*, (b) *by an agent?*

A. (*a*) He is not liable if he has not in any way conduced to the breach of trust, *e.g.*, if the co-trustee has received money apart from him. But he will be liable if he lets it then remain in the co-trustee's hands. If he pays money to a co-trustee who misapplies it, he will be liable unless his action was reasonable, *e.g.*, for the co-trustee to pay away in the place in which he resided. (*b*) He is liable unless it was necessary, or in the usual course of business, to employ an agent. In these cases he is not liable if he has been guilty of no negligence (*Re* Speight, Speight v. Gaunt, 9 App. Cases, 1; Indermaur's Equity, 75, 76.)

Q. When, and under what conditions, may trust property be followed into the hands of third persons?

A. It can be followed, as long as it is capable of identification, into the hands of every one except (1) a *bonâ fide* purchaser who has got the legal estate without notice of the trust, or (2) in the case of a negotiable

instrument in the hands of a holder in due course. (Indermaur's Equity, 87, 88.)

Q. Under what circumstances, if any, may a trustee purchase the trust property, or any interest therein?

A. The general rule is that a trustee cannot purchase of his *cestui que trust*, but such a purchase may stand if a full price is paid, and every possible fact that might affect the matter is disclosed, and no advantage taken by the trustee of his position. The onus of proving this would rest on the trustee. The trustee can always purchase by leave of the Court, and an originating summons to obtain such leave can be issued under Order LV., rule 3. (Indermaur's Equity, 81, 82.)

Q. To what extent, if at all, does lapse of time bar a claim by a cestui que trust against his trustee on an express trust?

A. Formerly the Statutes of Limitation did not apply in such a case, and lapse of time was never any bar unless the *cestui que trust* had been guilty of laches. If there had been laches the *cestui que trust* was prevented from suing because of the maxim, *Vigilantibus non dormientibus æquitas subvenit.* The Trustee Act 1888 (sec. 8), however, provides that as regards actions commenced after 1st January, 1890, trustees may plead any Statute of Limitation, except where the claim is founded on fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by him and converted to his own use. In these excepted cases, therefore, lapse of time does not bar unless there have been laches. (Indermaur's Equity, 82, 83.)

3. Administration.

Q. In what different ways may proceedings be commenced in the Chancery Division for the administration of the estate

of a deceased person. Has any other tribunal any jurisdiction of this nature?

A. Such proceedings are commenced by action in the ordinary manner, or else by originating summons under Order LV., rule 4. They should be commenced in the latter way if the matter is simple in its nature, and no special relief is sought, *e.g.*, to charge the executors with wilful default. Under the Bankruptcy Act 1883 (sec. 125), as amended by the Bankruptcy Act 1890 (sec. 21), an insolvent estate *may* be administered in bankruptcy, or if being administered in equity it *may* be transferred to bankruptcy.

Q. What do you understand by assets? Distinguish between legal and equitable assets respectively?

A. Assets means property of a deceased person available for payment of his debts. Shortly stated the distinction between legal and equitable assets is this, that where the assets devolve upon the executor *ex virtute officii*, then they are said to be legal assets available at law for payment of debts, but when they come to the executor under an express devise or trust, then they are said to be equitable, as only capable of being taken advantage of in equity, the distinction, therefore, referring to the remedy of the creditor and not to the nature of the property. (Indermaur's Equity, 108.)

Q. Explain the nature of, and reasons for, an executor's right of retainer. In what circumstances does it, and does it not, arise?

A. It is his right to retain a debt owing by the testator to himself out of legal assets in priority to other debts of the same degree, because he cannot, of course, sue himself, and it is a common rule that he has a right to prefer one creditor of the same degree to another. He cannot retain out of equitable assets, nor can he retain after a receiver has been appointed in administration proceedings. (Indermaur's Equity, 102, 103.)

Q. Have any, and if so what, classes of creditors any priority against the estate of deceased persons? When, and how, has the law on this subject been altered during the present reign?

A. Yes; debts rank thus:—(1) Debts due to the Crown by record or specialty; (2) debts preferred by particular statutes; (3) registered judgments against the deceased, and unregistered judgments against the personal representative; (4) recognizances and statutes; (5) specialty debts, arrears of rent, simple contract debts, and unregistered judgments against the deceased, and (6) voluntary bonds. By Hinde Palmer's Act (32 & 33 Vict., c. 69) the priority of specialty debts, which formerly existed over simple contracts, was taken away, and both of these debts were made to rank *pari passu*. If, however, the estate of the deceased is insolvent and is being administered in bankruptcy, these priorities are not observed, but all debts rank equally, subject to the provisions of the Preferential Payments in Bankruptcy Act 1888. (Indermaur's Equity, 108-112.)

Q. State shortly the law as to the rights and liabilities of executors in respect of contracts made, and torts committed during the lifetime of their testator?

A. In respect of contracts the rights and liabilities generally continue, and the maxim *Actio personalis moritur cum personâ* has no application, but the contract to marry is an exception, and there is no continued right or liability here, unless injury can be shown to the estate of the party (Chamberlain v. Williamson, 2 M. & S., 408; Finlay v. Chirney, 20 Q. B. D., 494). There is also no continued liability on contracts involving personal skill on the part of the deceased, and contracts of personal service expire with the death of either of the parties to them (Baxter v. Burfield, 2 Str. 1266). The liability or right in respect of torts generally ends with death (subject to certain statutory exceptions). When a liability continues the executor's liability

will be only to the extent of his testator's assets, unless he sets up a defence false within his own knowledge, or unless he admits assets.

Q. Explain shortly the position of an executor and of creditors, when the deceased's business is being carried on by the executor under a direction contained in the testator's will.

A. The executor is personally liable for debts incurred by him unless the creditors agree to look only to the estate; but he is entitled to indemnity out of the estate subject to this, that if the testator has only authorised a certain portion of his estate to be devoted to the business, then the right of indemnity will only extend to that portion. It was also decided in *Re* Gorton, Dowse v. Gorton (1891, A. C., 190) that the executor's right of indemnity is subject to the rights of those persons who were creditors of the testator at his death, unless, indeed, they have assented to the business being carried on, in which case the executor is entitled to indemnity even against them. (Indermaur's Equity, 98.)

Q. £1,000 *is owing to A by B deceased, and B's estate is being administered in Chancery. A holds security worth* £600. *Can A prove for his entire debt, or how should he proceed?*

A. Formerly he could have proved for the whole £1,000 and yet have retained his security; but it was provided by the Judicature Act 1875 (sec. 10) that the bankruptcy rules hereon should prevail. A therefore must realise his security and prove for the deficiency, or else estimate his security and prove for the deficiency. He might also, if he chose, relinquish his security and prove for the entire debt, or he might simply retain his security and not prove at all.

Q. Distinguish "specific," "general," and "demonstrative" legacies. How is the doctrine of ademption affected by the distinction? If a testator makes a will, leaving to A a sum described as now "owing to me on mortgage from B," and

afterwards the mortgage is paid off, and the money received by the testator and invested on another mortgage, is A's legacy gone?

A. *A specific legacy* is a bequest of a particular thing, or sum of money, or debt belonging to the testator, as distinguished from all others of the same kind., *e.g.*, my diamond ring, or a thousand pounds owing to me by C. *A general legacy* is a bequest to be satisfied out of the general personal estate, *e.g.*, a diamond ring or a thousand pounds. *A demonstrative legacy* is a bequest, which in its nature is a general legacy, but there is a particular fund pointed out to satisfy it, *e.g.*, a thousand pounds out of my consols. A specific legacy alone is liable to ademption, *i.e.*, the legatee loses the particular thing if testator does not own it at his death; but general legacies and demonstrative legacies are not liable to ademption—except when given to a child and a subsequent portion is given by the parent during his life, which will be a satisfaction or ademption *pro tanto* (see *post*, pp. 108, 109, Indermaur's Equity, 103, 104). The legacy to A is specific and is adeemed, for there exists nothing at the death on which the will can operate. (2 Wh. & Tu., 236, 282.)

Q. What are the rules as to legacies carrying interest?

A. The general rule is that they carry interest at 4 per cent. per annum, after the lapse of one year from the testator's death, but in the following cases they carry interest from the date of the testator's death, viz.:—(1) A legacy charged upon land; (2) a legacy to a child when there is no other provision for such child's maintenance; (3) a legacy given in satisfaction of a debt which itself carried interest; and (4) a specific legacy, and also a demonstrative legacy so long as it remains specific, carry with them their interest or profits from the date of the death. (Indermaur's Equity, 156.)

Q. Distinguish between vested and contingent legacies, and give an illustration of each. If a legacy is charged on land

and directed to be paid at a future day, what becomes of it if the legatee dies before that day?

A. A vested legacy is one which the legatee is to get in all events, even though the time of payment may be postponed, *e.g.*, a legacy to A payable on his attaining 21. A contingent legacy is one that the legatee is not to get unless a certain event happens, *e.g.*, a legacy to A if he shall attain 21. As regards legacies which are charged on land and the payment postponed, if the postponement is for the convenience of the estate, the legacy will nevertheless be paid, but if the postponement is with regard to some event personal to the legatee, then it is otherwise. (Indermaur's Equity, 104, 105.)

Q. The testator in each of the following cases died possessed of personal estate worth £300 *and of a freehold house worth* £1,000:—(a) *He bequeaths* £500 *to B, and the residue of his real and personal estate to C.* (b) *He bequeaths* £500 *to B, and his freehold house to C.* (c) *He bequeaths* £500 *to B, and then gives his real and personal estate to trustees upon trust to sell the same and apply the proceeds in payment of his debts and legacies, but does not make any further disposition of his estate.* (d) *He bequeaths* £500 *to B, and directs that the same shall be a charge on his real estate. State out of what property and in what proportions the legacy is payable, if at all, in each of the above cases, and who is entitled to the residue.*

A. (*a*) There is an implied charge of the legacy on the land, and B's legacy will be paid in full and C will get the rest of the estate. (*b*) B will get paid as much of his legacy as there is personalty to pay it, and C will get the freehold house specifically devised to him. (*c*) The legacy is payable rateably out of the estate, and assuming that there is enough money left after satisfying the debts, B's legacy will be paid in full. If there is any balance after this it will go to the heir-at-law and next-of-kin of the testator respectively. (*d*) B

gets his legacy in full, and after this the balance of the estate goes to the testator's heir-at-law. (See Goodeve's Realty, 3rd edition, 403.)

Q. What is a donatio mortis causâ? How does it (1) *resemble*, (2) *differ from, a legacy?*

A. It is a gift of personal property made by a person who apprehends that he is in peril of death at the time, and is evidenced by a delivery of the property, or the means of obtaining the possession thereof, to the donee, and a condition accompanies the gift that it is revocable at pleasure, and is necessarily revoked if the donor recovers. It resembles a legacy in that it is liable to both probate and legacy duty, and it is liable for debts on deficiency of assets. It differs from a legacy in that it vests in the donee from the delivery in the deceased's lifetime, and it requires no assent on the executor's part. (Indermaur's Equity, 106, 107.)

Q. In what order are the various assets of a deceased person to be applied in payment of debts?

A. The following is the order:—(1) The general personal estate. (2) Any estate particularly devised for payment of debts, and only for that purpose. (3) Estates descended to the heir. (4) Real or personal property charged with the payment of debts, and devised, or suffered to descend, or specifically bequeathed, subject to that charge. (5) General pecuniary legacies *pro ratâ*, including herein annuities, and also demonstrative legacies which have become general. (6) Specific devises, residuary devises, and specific bequests not charged with debts. (7) Real and personal estate appointed by will under a general power of appointment. (8) Paraphernalia of the widow of the deceased. (Indermaur's Equity, 114.)

Q. With regard to the order for application of assets mentioned in the last answer, when is the general personal estate of a deceased person not the primary fund for payment of his debts?

A. In the following cases:—(1) When the general

personal estate is by express words exonerated, and postponed to some other asset. (2) Where it is exonerated and postponed by the testator's manifest intention. (3) Where the debt is one in its nature real, *e.g.*, a jointure. (4) When the debt was not contracted by the person whose estate is being administered, but by someone else from whom he took it. (5) Where the debt is a mortgage debt, or one for which a vendor's lien exists. (Indermaur's Equity, 117.)

Q. Where a person dies leaving realty and personalty, and there being either a mortgage or a vendor's lien existing in respect of his realty, what are the rights of the various parties interested?

A. Under the Statute 17 & 18 Vict., c. 113, the mortgage debt is payable primarily out of the mortgaged property, and under the Statutes 30 & 31 Vict., c. 69, and 40 & 41 Vict., c. 34, this is also the case as regards a vendor's lien. Subject to any mortgage or vendor's lien, the realty will, of course, go to any devisee, or if none to the heir. The legatees or next-of-kin will get the personalty, subject to payment of any deficiency as regards the mortgage or vendor's lien, and subject to any other debts. (Indermaur's Equity, 118.)

Q. State and illustrate the doctrine of marshalling in the two classes of cases—(1) *marshalling assets of a deceased person;* (2) *marshalling securities.*

A. (1) Marshalling assets indicates the right of each beneficiary in the dead man's estate, as against the other beneficiaries (when all the creditors have been paid), to have the assets arranged so that they shall be deemed exhausted by the debts in the proper order in which they are applicable for that purpose. Thus, if a creditor has seized and sold a specific legacy in satisfaction of his debt, the specific legatee is entitled to claim an indemnity from the residuary legatee, a devisee in trust to pay debts, the heir-at-law, general legatees, and a devisee charged with debts, all of whose benefits are liable before his specific legacy. (2) Marshalling securities is the principle by which a creditor, who has a

right to go against two funds, may be compelled by a second creditor, who can only go against one of those funds, to take his debt, in the first place, out of that fund which the second creditor cannot touch, but this right cannot be exercised to the prejudice of a third party. (Notes to Aldrich v. Cooper, 2 Wh. & Tu.; Indermaur's Equity, 119-121, 124-126.)

Q. To secure a debt due from A's firm to their bankers, A, whose firm had, in the ordinary course of business, possession of some delivery warrants belonging to B, wrongfully pledged them with the bank without B's knowledge; and one of A's partners, who knew nothing of the fraud, also gave to the bank another security for the same debt. The firm having become bankrupt, the bank paid themselves by selling B's property. What remedy has B to recoup himself? What are the principles involved?

A. B is entitled to have the banker's securities marshalled; and, to the extent of the value of his property which the bank has sold, may have the benefit of the security given to the bank by the innocent partner, and may, therefore, prove against the innocent partner's estate to that extent. The principle is that a guarantee by one's partner for the debt of the firm, which gives the creditor the right to prove against the estate of that partner in addition to his right of proof against the general estate of the partnership, is a security to which marshalling applies. (*Ex parte* Salting, 25 Ch. D., 148; 2 Wh. & Tu., 116; Indermaur's Equity, 124-126.)

Q. What becomes of the undisposed-of residue of a testator's personal estate where the will appoints executors, but contains no residuary bequest?

A. Formerly the executor would have taken for his own own benefit, but now, under 1 Wm. IV., c. 40, he will be a trustee for the next-of-kin. If no next-of-kin, the executor will, however, still take for his own benefit. (*Re* Bacon, Camp v. Coe, 31 Ch. D., 460.)

Q. If testator gives his real and personal estate in trust to pay debts and other legacies, would the date of testator's death have any effect on a legacy to a charity?

A. Yes. Formerly, as the Court would not marshal assets in favour of a charity, the legacies would be deemed to be payable rateably out of the whole estate; and in so far as the estate consisted of realty, or leaseholds, or money savouring of realty, the charitable legacies would proportionately fail. This, however, is no longer so now, by reason of the Mortmain Act 1891, if the testator died after 5th August, 1891, and the charitable legacies would substantially stand in the same position as other legacies. (Indermaur's Equity, 121-124.)

Q. What is meant respectively by (1) *open account;* (2) *stated account;* (3) *settled account;* (4) *surcharging and falsifying?*

A. (1) An open account is one where the balance is not struck or is not accepted by all the parties. (2) A stated account is one which has been expressly or impliedly acknowledged to be correct by all the parties. (3) A settled account is one not only acknowledged to be correct, but which has also been discharged by payment, or otherwise, between the parties. (4) Surcharging signifies the showing amounts received and not accounted for; and falsifying means showing items of disbursement wrongly inserted in an account. (Indermaur's Equity, 137, 138.)

4. Partnership and Companies.

Q. Describe what is meant by partnership.

A. By the Partnership Act 1890 (sec. 1) partnership is defined as the relation which subsists between persons carrying on a business in common with a view to profit. This is the ordinary actual partnership, but a person is said to be

a dormant partner when, though participating in profits, he takes no active part in the concern. Further, if a person allows his name to appear in a firm, though he does not participate in the profits, or, in fact, have anything to do with the concern, he may be estopped from denying that he is a partner. Such a person is styled a nominal partner.

Q. Point out the differences between co-partnership and co-ownership? Explain what is meant by a "partner's lien."

A. Co-ownership need not arise from agreement, partnership must; the former need not involve community of profit and loss, partnership must; each co-owner may transfer his share to a stranger, a partner cannot, so as to make the alienee a partner; each partner is the implied agent of the rest, but each co-owner is not; a partner has a lien for outlays, but a co-owner has not; a partner cannot compel partition, but a co-owner can; a co-owner's share of realty devolves on his devisee or heir, but a partner's share on his personal representative; partners have an action of account but not so necessarily co-owners. By a partner's lien is meant the right of each partner on dissolution to have all the property belonging to the partnership sold, and the proceeds of sale, after discharging all the partnership debts and liabilities, divided amongst the partners according to their respective shares in the capital. (Pollock's Partnership, 5th edition, 5, 100.)

Q. What are the rules by which the question whether a partnership does or does not exist is to be determined?

A. Joint tenancy or other co-ownership does not of itself create a partnership, nor does the sharing in gross returns. The receipt of a share of profits is *primâ facie* evidence of partnership, but does not necessarily create a partnership, and in particular none of the following positions necessarily create a partnership: (*a*) The receipt of a debt by instalments or otherwise out of accruing profits. (*b*) The remuneration of a servant or agent by a share of profits. (*c*) The payment

of any money to a widow or child of a deceased partner out of profits. (*d*) The lending of money to receive interest varying with the profits. (*e*) The receiving a portion of profits in consideration of the sale of a goodwill. (Partnership Act 1890, sec. 2.)

Q. What are the principal rules contained in the Partnership Act 1890, *with regard to rights and duties of partners inter se?*

A. The general rules, as laid down in Section 24, are as follows: (1) Profits, capital, and losses are to be shared equally. (2) Partners to be indemnified for payments and liabilities made and incurred in the ordinary course of business. (3) Extra capital to bear interest at £5 per cent. (4) No partner entitled to interest on capital till profits ascertained. (5) Every partner entitled to take part in the management of the partnership business, but without remuneration. (6) No new partners to be introduced without consent of all. (7) In case of dispute majority to prevail, but no change in the nature of the business without consent of all. (8) Books to be kept at principal place of business, with liberty to each partner to inspect and copy.

Q. What events dissolve a partnership? Explain how the affairs of a partnership should be wound up in case there are no articles of partnership, and owing to losses the assets are insufficient to repay the capital embarked.

A. A partnership is dissolved—(1) If for a fixed term by effluxion of time. (2) If for a single undertaking by the termination thereof. (3) If for an undefined time by reasonable notice. (4) By death. (5) By bankruptcy. (6) By the unlawfulness of the business. (7) By the decree of the Court. (Partnership Act 1890, secs. 32-44.) Section 44 of the Partnership Act 1890, provides that the assets shall be applied—(1) In paying the debts and liabilities of the firm to persons who are not partners. (2) In paying to each partner rateably what is due from the firm to him for

advances. (3) In paying to each partner rateably what is due from the firm to him in respect of capital. This would, under the circumstances stated in the question, exhaust the assets, and it is unnecessary, therefore, to proceed further. There being no partnership articles, the presumption would be that the capital had been brought in in equal shares.

Q. On what grounds will the Court dissolve a partnership?

A. The following are the chief grounds :—That a partner has been found lunatic by inquisition, or is permanently insane. Incapability of a partner to perform his part of the partnership contract. That a partner has been guilty of conduct calculated to prejudicially affect the carrying on of the business. That a partner has persistently committed breaches of the partnership business. That the business can only be carried on at a loss. That the circumstances are such that it is just and equitable that the partnership should be dissolved. (Partnership Act 1890, sec. 35.)

Q. When will Equity interfere between partners—(a) *by granting an injunction ;* (b) *by appointing a receiver ;* (c) *by appointing a manager?*

A. (*a*) It will be granted, irrespective of any claim for dissolution, to prevent a partner acting contrary to the partnership agreement, or contrary to the good faith which each partner is bound to observe towards the others, *e.g.*, to prevent omission of a partner's name, or his exclusion from the place of business. (*b*) A receiver will generally only be appointed with a view to a dissolution or final winding up of the partnership affairs. (*c*) A manager will be appointed for the purpose of carrying on the business under the control of the Court, when it is desired to sell it (upon dissolution) as a going concern. (Indermaur's Equity, 130, 131.)

Q. A is taken into partnership by B, who pays a premium.

On dissolution of partnership, can B claim a return of his premium?

A. By Section 40 of the Partnership Act 1890, where the partnership was for a fixed term, and is dissolved before the expiration of that term otherwise than by death of a partner, the Court may order the return of the premium, or such part thereof as it thinks just, having regard to the terms of the articles and the length of time the partnership has endured, unless the dissolution is wholly or chiefly due to the misconduct of the partner who paid the premium, or the partnership has been dissolved under an agreement containing no provision for a return of any part of the premium. (Indermaur's Equity, 131.)

Q. State the rule in Clayton's case. Show how it applies in favour of or against—(a) *deceased partners;* (b) *retired partners;* (c) *incoming partners, of a banking business in the accounts between the bank and its customers.*

A. The rule is as regards appropriation of payments, and is threefold: (1) The debtor has the first right to state in respect of what debt or contract the payment is made. (2) Failing this the creditor has the right. (3) Failing this, the law presumes that it was made in respect of the earliest contract or debt, commencing with the liquidation of interest due. (*a*) As regards deceased partners, any amounts drawn out after the decease of a partner will be presumed to be on account of the balance owing at the time of the deceased partner's death, and if insolvency occurs the estate of the deceased partner will only be liable for the balance. (*b*) The same rule applies where a partner retires. (*c*) An incoming partner is not, as a rule, liable for debts contracted before he became a partner, but if such debts and others subsequently contracted are allowed to form one single account, and payments are made generally with respect to it, these payments (though made with moneys of the new firm) will be applied to the old debt, and a balance will be left for which the incoming partner will be liable.

Q. Will Equity decree specific performance of an agreement to form a partnership?

A. The Court will not generally do so, for "it is impossible to make persons who will not concur carry on a business jointly for their own common advantage." But where such an agreement has been acted on, the execution of a formal deed recording its terms may be ordered by way of specific performance, if necessary, to do justice between the parties. (Pollock's Partnership, 6.)

Q. What are the respective rights of vendor and purchaser of a goodwill?

A. As between himself and the vendor, the purchaser acquires the right to carry on the business under the old name; whilst, in the absence of stipulation, the vendor may compete with him in the same line of business, may advertise such business, and may even specially solicit the customers of the old firm to transfer their custom to him, but he must not in any way represent himself as still carrying on the old business. (Pearson v. Pearson, 27 Ch. D., 145; Pollock's Partnership, 105.)

Q. What is the mode of proceeding against partnership property in respect of a partner's separate judgment debt?

A. Under the Partnership Act 1890 (sec. 23) the Court may make an order charging the partner's interest in the partnership property with payment of the judgment debt, and may appoint a receiver of that partner's share, and may order all accounts and inquiries, and make all directions which might have been made if the charge had been made by the partner, or which circumstances require. The other partners are at liberty to redeem the interest charged, or if a sale is directed to purchase. Under Section 33, on such an order being made, the partnership may, at the option of the other partners, be dissolved.

Q. State shortly the provisions of the Partnership Act 1890 *as to the misapplication of money received for a firm. A and*

B are solicitors in partnership. C, a client of the firm, hands a sum of money to A, to be invested in a specified security, and subsequently a further sum, with general directions to invest it for him. A never invests either sum, but applies both sums to his own use. B knows nothing of the transactions. Is he liable to make good either of the losses?

A. In the following cases, viz.: (*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and (*b*) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss (Section 11). As to the first sum of money handed by C to A, B also is liable since this is part of the ordinary business of solicitors (Blair v. Bromley, 2 Ph., 354); but as to the second sum it is otherwise (Harman v. Johnson, 22 L. J., Q. B., 297). (Pollock's Partnership, 42, 43.)

Q. Explain and illustrate the grounds on which persons who are not actually partners may be held liable for the debts of a firm, and state the limits of such liability.

A. The real ground is estoppel, viz., that the person has (by speech, writing or conduct) represented, or has knowingly allowed others to represent that he is a partner in a particular firm, and that credit has been given to the firm on the faith of that representation (see Partnership Act 1890, sec. 14). If A tells B he is a partner in C & Co., and B tells D, and D consequently sells goods to C & Co., A is liable to D. To avoid this liability, a retiring partner gives notice in the *London Gazette*, and also to all customers of the firm; but a deceased partner is not liable on the doctrine of holding out. (Pollock's Partnership, 50.)

Q. Point out the principal differences between a share in a partnership and a share in a registered company.

A. An ordinary partnership is founded on personal con-

fidence between the partners, and gives every partner equal rights in the conduct of the business unless there is an express agreement to the contrary. A commercial company on the other hand is regularly composed of a minority of active members designated directors, and of a majority who need not, and most commonly do not, know anything of one another, and have no part in the ordinary conduct of the business. (Pollock's Partnership, 7, 8.)

Q. Define and distinguish—(a) *partnership;* (b) *unincorporated company;* (c) *joint adventure;* (d) *incorporated company.*

A. (*a*) It is the relation existing between persons who have agreed to share the profits of a business carried on by all, or by any of them on behalf of all. (*b*) It is a species of partnership intermediate between a corporation at common law, and an ordinary partnership. (*c*) It is a limited partnership confined to one particular venture, in which the partners use no firm name, and incur no responsibility beyond the limits of the venture. (*d*) It is a corporation registered under the Companies Acts with a common seal, and sues, and is sued, in its corporate name. (Indermaur's Equity, 127.)

Q. What are the different functions of—(a) *partnership articles;* (b) *memorandum of association;* (c) *articles of association?*

A. (*a*) To define the scope of the partnership, and the shares, interest, duties, and general rights and positions of the partners. (*b*) To define the name of the company, its place of business, objects, liabilities of the members, and amount of capital. (*c*) To prescribe the regulations for the management and conduct of the business of the company.

Q. What are the various Courts which have jurisdiction to wind up joint stock companies, and under what circumstances do their jurisdiction exist?

A. (1) The High Court. (2) The Chancery Courts of the

Counties Palatine of Lancaster and Durham. (3) The County Courts. (4) The Stannaries Courts. Applications to wind up must be made (*a*) To the High Court, where the paid-up capital exceeds £10,000. (*b*) To the Palatine Court or High Court if the Company is situate within the jurisdiction of either of the Palatine Courts, and its capital exceeds £10,000. (*c*) To the County Court in whose jurisdiction the registered office of the company is situate, if the capital is less than £10,000, and provided the County Court has jurisdiction in bankruptcy. (*d*) To the Stannaries Court if the company is formed to work mines within the Stannaries, and is not shown to be actually working mines, or to be engaged in an undertaking outside those limits, or to be under a contract to do so, whatever the capital of the company may be. (Eustace Smith's Companies, 5th edition, 74, 75.)

Q. Shortly state the practice of the Court as to settling lists of contributories. What are the different classes of contributories in the winding-up of a company?

A. To answer the last part of the question first, there are two classes, viz., actual shareholders at the commencement of the winding-up, who are all placed in the A list, and past members who have, however, only ceased to be members within a year prior to the commencement of the winding-up, who are placed in the B list. The A list is settled as soon after the appointment of the liquidator as possible, but the B list not until it is shown that the present members of the company are unable to satisfy the debts. Notice is given of the date of settling the list of contributories, and the liquidator hears any persons who desire to urge objections why they should not be placed on the list, and he finally settles it. Every contributory placed on the list receives notice thereof, and may apply to vary by summons taken out within 21 days. (Eustace Smith's Companies, 111.)

Q. In what modes may a company be wound up, and how

do the various modes differ from each other? On what grounds may a compulsory winding-up order be made?

A. In three ways, viz.: (1) By the Court; (2) Voluntarily; (3) Subject to the supervision of the Court. The general scheme is the same in all these methods. The great distinction between winding-up by the Court and voluntary winding-up is, that in the first case the liquidators are officers of the Court and trustees for the creditors, whereas in the second case they are appointed by and are trustees for the company. In the case of a winding-up, subject to the Court's supervision, the liquidators are appointed by the company, but are subject to the Court's control. The following are the grounds:—(1) Special resolution to wind up by the Court. (2) Not commencing business within a year, or suspending business for a year. (3) Members reduced to less than seven. (4) Inability to pay debts. (5) That it is just and equitable to wind up. (Eustace Smith's Companies, 72, 73.)

Q. What are the dates at which orders for winding-up a company (a) *compulsorily*, (b) *voluntarily*, (c) *under the supervision of the Court, commence respectively?*

A. (*a*) From the date of the presentation of the petition. (*b*) From the date of the passing of the resolution to wind up. (*c*) From the date of the passing of the resolution to wind up, and not from the date of the presentation of the petition on which the order is made. (Lindley's Companies, 5th edition, 664.)

5. Mortgages.

Q. Explain, and illustrate, with reference to mortgages, the maxims, "Equity regards the spirit and not the letter," and "Once a mortgage always a mortgage."

A. At Common Law, if the mortgage was not paid off on the day named in the deed, the mortgagee became absolute owner, the mortgage being regarded as an estate granted to the mort-

gagee absolutely, subject to a condition to be performed by the mortgagor, and if not performed, the mortgagor's right was gone for ever. Equity, however, acting upon the first maxim mentioned in the question, regarded the transaction as a security for money only, and always allowed the mortgagor to come and redeem upon payment of principal, interest, and costs. This right was called the mortgagor's equity of redemption. The second maxim mentioned in the question means that if a transaction has once been clearly shown to be a mortgage, a mortgage it will always remain. Thus a clause in the deed, providing that the mortgagor's equity of redemption should be barred if the mortgage was not paid off within five years, would be perfectly useless. (Howard v. Harris, 2 Wh. & Tu., 1178; Indermaur's Equity, 142.)

Q. A sells property to B for £1,000, *reserving a right of buying it back at the end of a year for* £1,100. *He does not exercise this right within the year, but shortly afterwards claims to do so. Can he maintain this claim?*

A. No, not if the transaction is really not a mortgage, but is an out and out sale with a right of re-purchase, for here the day named must be strictly observed. It may sometimes be difficult to tell which really the transaction is meant to be, and the following circumstances will all, with more or less force, point to its being a mortgage, in which case strict observance of the day is of no consequence:—(1) That the grantor remained in possession, merely accounting for rents as interest; (2) that the grantee, though in possession, accounted for rents and profits to grantor; (3) that the grantor paid the costs of the instrument; (4) that the sum paid was totally inadequate, having reference to the value of the property. (Indermaur's Equity, 146, 147.)

Q. What is meant by an Equity of Redemption? What notice must be given by a mortgagor who wants to pay off?

A. An Equity of Redemption is that equitable right existing in a mortgagor, after the day named for payment

has gone by, under which he is entitled to redeem, and have the property reconveyed to him on payment of principal, interest, and costs. The mortgagor desiring to pay off a mortgage after the day named in the deed, must give six months' notice, or pay six months' interest in lieu of notice, so that the mortgagee may have time to find another investment for his money. However, in the case of an equitable mortgage by deposit, reasonable notice only need be given, so as to enable the mortgagee to look up the deeds (Fitzgerald's Trustee v. Mellersh, 61 L. J., Ch., 231). (Indermaur's Equity, 152, 153.)

Q. How may a mortgagor lose or be deprived of his Equity of Redemption?

A. (1) By foreclosure, that is by the mortgagee taking proceedings in Chancery asking for an account to be taken, and for an order for payment by a certain date, usually six months from the date of the Chief Clerk's certificate, and that if not then paid the mortgagor be deprived of any further right. (2) By sale of the property by the mortgagee under his powers, but, of course, the mortgagor is entitled to an account and payment of any balance. (3) By force of the Real Property Limitations Act 1874, under which, if the mortgagee goes into possession and holds for 12 years without giving any acknowledgment in writing of the mortgagor's right to redeem, such right is statute barred. (4) Under the Statute 4 & 5 Wm. & Mary, c. 16, a mortgagor loses his Equity of Redemption if he mortgages a second time without disclosing the prior mortgage.

Q. Explain what is meant by re-opening a foreclosure.

A. By it is meant the Court permitting a mortgagor to redeem although a foreclosure decree has been made. Thus, if a mortgagee forecloses and then sues, this operates to re-open the foreclosure. And the Court has a discretionary power to re-open a foreclosure on special grounds, *e.g.*, ignorance of the state of the proceedings, or the day fixed

for payment, irregularity in the proceedings, illness, or accidental inability to travel on the part of the person who should have paid the money, or even temporary poverty on the part of such person. (Indermaur's Equity, 163.)

Q. Can a mortgagee, after having foreclosed, or after having sold the mortgaged property, sue for any deficiency?

A. He can sue after foreclosure, but it re-opens the foreclosure, and gives the mortgagor the renewed right to redeem, and it therefore follows that if he has not merely foreclosed, but has then proceeded to sell the property, or any part of it, he cannot sue, because he no longer has the estate in his possession ready to restore to the mortgagor on payment (Lockhart v. Hardy, 9 Beav., 349). But if he has simply sold under his power of sale, he may sue for any deficiency. (Rudge v. Rickens, L. R., 8 C. P., 358; Indermaur's Equity, 166.)

Q. Explain shortly the position of a person who purchases an Equity of Redemption.

A. He is generally in the same position as the original mortgagor, but is not liable to the mortgagee to pay him the mortgage debt, unless the mortgagee has joined in the transaction, and the purchaser has covenanted with him to pay the amount. But he will (in the absence of express stipulation) indirectly incur a liability, as there is an implied covenant to indemnify the mortgagor against further liability on the mortgage debt. (Waring v. Ward, 7 Ves., 337; Indermaur's Equity, 144.)

Q. What are the remedies possessed by a legal mortgagee? and in what order must he resort to them?

A. His chief remedies are four in number—(1) to sue for his money; (2) to enter into possession and eject the mortgagor, and then he has certain other incidental powers, *e.g.*, a power of leasing; (3) to sell under express powers granted by mortgage, or by statute; (4) to foreclose. He may exercise all his remedies concurrently, but if he first forecloses and

then sues, this re-opens the foreclosure, and gives the mortgagor a renewed right to redeem, and if he has, after foreclosure, sold the property or any part of it, he cannot then sue, as he has not got the property to restore to the mortgagor on payment. (Indermaur's Equity, 156, 166.)

Q. What is meant by an equitable mortgage? Explain why it is allowed. What are the remedies of an equitable mortgagee?

A. An equitable mortgage is one effected by a memorandum of charge on the property, or by a deposit of the title deeds, either alone, or with a memorandum. The ground on which it is allowed, is that if the depositor sued at Law to recover the title deeds, the lien of the depositee would be an answer, and if he sued in Equity for specific delivery, the maxim "He who seeks Equity must do Equity," would apply (Russell v. Russell, 1 Wh. & Tu., 773). If the mortgage is by deposit, the proper remedy is foreclosure; but if there is also an agreement to execute a legal mortgage, the mortgagee has the option of suing either for foreclosure or sale. In any foreclosure suit also the Court has a discretion to direct a sale. (Indermaur's Equity, 149, 164.)

Q. Who has priority in each of the following cases, and why?—(a) *Equitable mortgage to A, followed by a legal mortgage to B.* (b) *Legal mortgage to C, followed by equitable mortgage to D.* (c) *Equitable mortgage to E, followed by equitable mortgage to F.*

A. (*a*) The legal mortgagee B will have priority if he had no notice, actual or constructive, of the equitable mortgage to A, for "Where the Equities are equal the Law prevails." If B did not get the deeds their absence would generally amount to constructive notice of the prior equitable mortgage, but this would not be so if he had enquired for the deeds and a reasonable excuse was given for their non-production (Agra Bank v. Barry, Indermaur's Conveyancing and Equity Cases, 116). (*b*) C has both the legal

estate and priority of time, and must have preference over D in the absence of any circumstances of fraud or conduct on C's part, which enabled the second advance to be obtained without notice of the prior one (Northern Counties Insurance Co. v. Whipp, 25 Ch. D., 482). (*c*) E will have priority for neither has the legal estate, and the maxim is *Qui prior est tempore potior est jure.*

Q. State the order in which the incumbrances are payable in the following cases:—(a) *A gives a legal mortgage to B, a second mortgage to C, subject to B's mortgage, and then B makes further advances to A.* (b) *A gives a legal mortgage to B, who lends the title deeds to A. A deposits the deeds with C to secure a loan then made, C having no notice of B's mortgage.* (c) *A gives an equitable charge by deposit of deeds to B. B lends the deeds to A, who obtains a loan from C on deposit of the deeds. C has no notice of B's charge.* (d) *A mortgages land in Middlesex to B, who does not register his mortgage. A then mortgages the same land to C, who has notice of B's mortgage, and registers his own security.*

A. (*a*) If B knew of A's second mortgage when he made his further advances, the order will be B's mortgage, then C's, and then B's further advances; but if B did not know, B can tack his two advances together and postpone C (Rolt v. Hopkinson, 9 H. L. Cas., 514). (*b*) Here B is postponed to C on account of his own gross negligence (Briggs v. Jones, L. R., 10 Eq., 92). (*c*) C has priority, because B has lost his priority through laches, and as the equities are not equal, C, though later in time, gets priority (Rice v. Rice, 2 Drew, 73). (*d*) B has priority because C took with notice, and so the object of the Middlesex Registry Act is accomplished. (Le Neve v. Neve, 2 Wh. & Tu., 26; Indermaur's Equity, 170, 171.)

Q. Explain tacking fully, and give an illustration.

A. It is the uniting of securities given at different times, so as to prevent any intermediate incumbrancer from claiming

a title to redeem, or otherwise to discharge one lien which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title, *e.g.*, A, B and C, are first, second and third mortgagees, but when C advanced his money he thought he was second mortgagee, and, therefore, if he can buy up A's mortgage, and thus get in the legal estate, he will be able to get payment of both mortgages before B (Marsh v. Lee, 1 Wh. & Tu., 696). The reason for the doctrine is found in the maxim, "Where the Equities are equal the Law shall prevail." (Indermaur's Equity, 169.)

Q. A, B and C have successive incumbrances on lands of D. Under what circumstances can C obtain priority for the last advance over B's incumbrance by obtaining a transfer of A's security, and when would he not obtain priority?

A. If C, when he advanced his money, was not aware of B's advance he can, by buying up A's mortgage and obtaining the legal estate, get payment of both mortgages before B. But if C had notice of B's incumbrance when he advanced his money, he could not thus get priority. (Indermaur's Equity, 169.)

Q. What is meant by the doctrine of consolidation? How did the Conveyancing Act affect the topic?

A. Consolidation may be defined as the right of a mortgagee having two or more securities from the same mortgagor, to refuse to allow the mortgagor to redeem one of them without redeeming the other or others. It had its origin in the maxim, "He who seeks Equity must do Equity." (See Vint v. Padget, and Notes in Indermaur's Conveyancing and Equity Cases, 96.) The Conveyancing Act 1881 (sec. 17) provided that when the mortgages, or one of them, are or is made on or after 1st January, 1882, and so far as no contrary intention is expressed, a mortgagor seeking to redeem shall be entitled to do so without paying any money due under any separate mortgage made by him, or by any person

through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

Q. A sole mortgagee of freeholds, copyholds, and leaseholds dies, having devised his real estate to B, and bequeathed his personal estate to C, and appointed D (who proves the will) his executor. Who can give a valid discharge for the mortgage money? and who can reconvey the various properties?

A. As regards the freeholds the money will be paid to, and the estate reconveyed by, the executor D (Conveyancing Act 1881, sec. 30). As regards the copyholds, though the money will be paid to the executor D, the devisee B will will reconvey (Copyhold Act 1887, sec. 45). As regards the leaseholds, the money will be paid to, and the estate reconveyed by, the executor D. (Indermaur's Equity, 154.)

Q. What powers were given to a mortgagor in possession by the Judicature Act 1873, *and the Conveyancing Act* 1881?

A. Under the Judicature Act 1873, if no notice of intention to enter has been given by the mortgagee, the mortgagor may sue for the recovery of the rents and profits, or for damages in respect of trespass, &c., thereto, in his own name only. Under the Conveyancing Act 1881, he may make agricultural or occupation leases for 21 years, or building leases for 99 years, to take effect in possession within one year, at the best rent, without fine, with usual covenants and provisions for re-entry on non-payment of rent for not exceeding 30 days, and must deliver counterpart signed by lessee within one month to mortgagee, or first mortgagee if more than one. (Indermaur's Equity, 150, 151.)

Q. What sums is a mortgagee in possession entitled to add to his mortgage debt?

A. He is entitled to add any proper costs incurred, any money he may properly have expended in maintaining his title, any sums properly paid for insurance, or for renewing renewable leaseholds, and any money expended in necessary repairs. But he may not add to his property money expended

in general improvements, for he has no right to make the estate more expensive for the mortgagor to redeem than is necessary. (Indermaur's Equity, 160.)

Q. What is meant by decreeing an account against a mortgagee in possession with annual rests? When will an account be so decreed to be taken?

A. By it is meant striking an annual balance, and applying any net amount then in the mortgagee's hands in reduction of the principal from time to time. If the mortgagee entered when no interest was in arrear, and there was no other special reason for his entering, then, as he must have entered solely for the purpose of getting his principal, which could only thus be paid gradually, he has shown his willingness to receive payment by driblets, and annual rests will be made, *i.e.*, a yearly balance will be struck, and any surplus, after payment of costs and interest, will, from time to time, be applied in reduction of the principal, which will produce a corresponding abatement of interest. (Indermaur's Equity, 159.)

Q. Enumerate the disadvantages of a second mortgage.

A. They may be summarized as follows: (1) The second mortgagee does not get the legal estate, or the deeds, both of which are taken by the first mortgagee. (2) He is liable to be postponed in some cases by reason of tacking. (3) He is entirely subject to the first mortgagee, and can only exercise his powers subject to the first mortgagee's rights. (4) He is liable to be made a party to a foreclosure suit, or to the property being sold over his head, and he may be obliged, in order to avoid losing his whole security, to pay off the first mortgagee, and thus take the security into his own hands. (Indermaur's Equity, 176.)

6. Fraud, Accident and Mistake.

Q. On what grounds can a deed executed by a person of full age, who understands its contents, be set aside?

A. (1) On the ground of some actual fraud which may

have been perpetrated on him either by misrepresentation, or by concealment, where the other party was bound to disclose certain facts. (2) On the ground of some constructive fraud, *e.g.*, in Huguenin v. Baseley (2 Wh. & Tu., 597). (3) On the ground of accident or mistake. (See Indermaur's Equity, Part II., Chap. VI.)

Q. Define actual and constructive fraud respectively, and explain the distinction between them.

A. Actual fraud may be defined as something said, done, or omitted by a person, with the design of perpetrating what he must have known to be a positive fraud; whilst constructive fraud is something said, done, or omitted, which is construed by the Court as a fraud, because, if generally permitted, it would be prejudicial to the public welfare. The great distinction between them is that in cases of actual fraud there is always a design to do evil; whilst in cases of constructive fraud there is not necessarily any such evil design, and there may, indeed, be nothing really harmful in the particular transaction, yet to allow it to stand would be to open the door to much possible evil in other cases. (Indermaur's Equity, 189.)

Q. A sells an estate to B at an undervalue. In which of the following cases can A bring an action for damages, or set aside the sale respectively? (a) *B makes a statement about the estate, which B believes to be true, and thereby induces A to sell at a lower price. The statement is in fact untrue;* (b) *B, having no knowledge or belief on the matter, makes a statement, which is in fact untrue, about the estate;* (c) *B, knowing of the existence of valuable mines under the estate, and that A is ignorant of the fact, refrains from telling A, and thereby gets the property below its true value.*

A. (*a*) A has no right of action for damages, for B believed his statement to be true, and it is not, therefore, fraud (Derry v. Peek, 14 App. Cases, 337), but if A relied on the state-

ment then he might take proceedings to set the sale aside, or successfully resist specific performance (Redgrave v. Hurd, 20 Ch. D., 1); (*b*) A can set the sale aside, or successfully resist specific performance, and also can bring an action for damages, if he can show that B made the statement recklessly, for this would constitute fraud (Derry v. Peek, *supra*); (*c*) A has no right of action, nor can he set the sale aside, as a purchaser is not bound to inform his vendor of facts that he is aware of that render the property more valuable than the vendor thinks it is, unless, indeed, a fiduciary relationship exists. (Indermaur's Equity, 190-192.)

Q. What contracts will be set aside on the ground of constructive fraud, as being contrary to the policy of the law?

A. Instances of such contracts are: Marriage brokage contracts, contracts or conditions in restraint of marriage, frauds on marriages, and agreements to influence testators. (Indermaur's Equity, 196.)

Q. Give instances of fidiciary relationships which may vitiate contracts and other transactions entered into between the parties.

A. Those existing between trustees and *cestuis que trustent*, solicitor and client, principal and agent, guardian and ward, parent and child, &c. (Indermaur's Equity, 198-205.)

Q. Define an expectant heir. On what principle does the Court construe dealings with them?

A. An expectant heir is one who has either some reversionary interest, or, at any rate, has an expectancy of some future benefit. The general rule of the Court is to set aside transactions with expectants on the principle of constructive fraud, if the expectant, after coming into possession, applies to the Court with reasonable diligence (Earl of Chesterfield v. Janssen, 1 Wh. & Tu., 624). But such a transaction will be maintained if full consideration was paid and it was altogether fair; and if it was made known to, and approved by, the

person to whose estate the expectant hoped to succeed, then also it may stand. With regard to reversions it has now been provided by 31 Vict., c. 4, that no purchase of any reversionary interest shall hereafter be opened or set aside merely on the ground of undervalue. (Indermaur's Equity, 206.)

Q. What is meant by a fraud on a power? Give an illustration.

A. It means such an execution of a special power of appointment as, though apparently good, is, nevertheless, not made *bonâ fide* for the direct end reserved, but operates virtually to defeat the objects of the donor of the power. Thus, in Aleyn v. Belchier (1 Wh. & Tu., 437), a husband, having a power of jointuring his wife, executed the power with an agreement with the wife that she should receive part only as an annuity for her benefit, and that the residue should be applied in payment of the husband's debts. It was held that this private agreement for the husband's benefit was a fraud on the power, and it was set aside.

Q. Define and illustrate an illusory appointment and an exclusive appointment respectively. Are such appointments valid?

A. An illusory appointment is where a person, having a power of appointment amongst a certain class, appoints to all the members of such class, but only gives a nominal share or shares to one or more members. Thus, A having a power of appointment over £1,000 in favour of B, C, and D, appoints £500 to B, £499 19s. to C, and 1s. to D; the appointment to D is merely illusory. An exclusive appointment is where the donor of the power appoints the whole fund to one member of the class to the exclusion of the others. Both illusory and exclusive appointments were void in Equity, as being considered frauds on the power, but an illusory appointment was allowed at Law, and by 1 Wm. IV., c. 46, it was also permitted in Equity. An exclusive appointment,

however, remained invalid until the year 1874, when was passed 37 & 38 Vict., c. 37, which made even an exclusive appointment valid. (Indermaur's Equity, 213.)

Q. On what grounds may (a) *settlements, and* (b) *sales be set aside at the instance of the settlor or vendor?*

A. (*a*) If voluntary and executory; if executed through fraud, undue influence, or mistake, and the parties can be restored to their original position; if a voluntary settlement in favour of his creditors and not yet assented to by them; if the very object with which the trust was created has ceased to exist. (*b*) If the vendor was induced to sell by fraud, or if the sale is to a trustee, or person in a fiduciary position, who had not the leave of the Court, or who did not give full value and take no advantage. In both cases there must not be laches or acquiescence, and third parties must not have acquired innocently for value. (Indermaur's Equity, 182-185.)

Q. What is meant by an accident remediable in Equity? Give an example.

A. Accident as relieved against in Equity may be defined as some unforeseen event, misfortune, loss, act, or omission, not the result either of negligence, or misconduct of the party. Thus, an annuity is given by will, and the executors are directed to set aside a sufficient amount of certain stock to meet such annuity. This they do, but subsequently the stock is reduced by Act of Parliament so that the annuity falls short. The Court will decree the deficiency to be made up against the residuary legatee. (Indermaur's Equity, 177, 180.)

Q. Define mistake. When will the Court relieve in cases of mistake?

A. Mistake may be defined as some unintentional act, omission, or error arising from ignorance, surprise, imposition or misplaced confidence, and may be either mistake of fact or mistake of law. The Court will generally relieve in cases

of mistake of fact if the mistake is of a material nature, for the rule is *Ignorantia facti excusat.* But the Court will not generally relieve in cases of mistakes of law, the rule being *Ignorantia legis neminem excusat.* To this rule, however, there is one exception, viz., where the mistake was one of title, arising from ignorance of a principle of law of such constant occurrence as to be supposed to be understood by the community at large (Lansdowne v. Lansdowne, Indermaur's Conveyancing and Equity Cases, 146). The Court will also relieve in cases of mistake of foreign law. (Indermaur's Equity, 181, 182.)

Q. In what cases, and in whose favour, will the Court relieve against the defective execution of a power of appointment? Will it ever relieve against the non-execution of a power?

A. The Court will relieve, either on the ground of accident or mistake, where the defect is not of the essence of the power, and is in favour of a purchaser, a creditor, a wife, an intended husband, a legitimate child, or a charity (Tollet v. Tollet, 1 Wh. & Tu., 269). The Court will not relieve against the non-execution of a power unless the power was coupled with a trust, or its execution has been prevented by fraud. (Indermaur's Equity, 178, 179.)

7. Specific Performance.

Q. What is meant by "specific performance of contracts," and to what kind of contracts is the doctrine confined?

A. It is a remedy peculiar to Equity, by which the Court will in some cases enforce, by attachment, strict performance of a contract, instead of leaving the person to his remedy by action for damages at law, the doctrine being based on the maxim, "Equity acts *in personam.*" Specific performance will only be granted in cases in which damages will not

completely compensate, *e.g.*, in contracts for the sale of land and houses. (Indermaur's Equity, 217, 220.)

Q. State shortly the essentials of a valid simple contract of which specific performance can be obtained, both as regards the ordinary requisites of such a contract and the nature of the property?

A. The requisites of the contract are: (1) Parties able to contract; (2) mutual assent; (3) valuable consideration; (4) something to be done or omitted which forms the object of the contract. The contract must be of such a nature that damages will not compensate the parties for its breach, otherwise they will be left to their remedy by action for damages. (Indermaur's Equity, 217, 219.)

Q. When will the Court decree specific performance of a contract contained in letters?

A. Where from the letters there is found a direct offer on the one side, and an unconditional acceptance on the other, without the introduction of any fresh term or stipulation, and the Court can collect, from a fair interpretation of the letters, that they import a concluded agreement. Thus, if A writes to B offering to sell a house for £1,000 and B writes back simply accepting the offer, here there is a binding contract; but if B in accepting the offer were to insert as a condition that half the purchase-money should remain on mortgage, here there would be no binding contract. (Indermaur's Equity, 218, 219.)

Q. A offers by letter to buy a house from B for £1,000—(a) *B accepts the order verbally;* (b) *B writes:—"I accept your offer subject to my solicitor approving a formal contract." Can A sue B, or B sue A, in the above cases respectively, if the other party refuses to complete?*

A. (*a*) B can sue A for specific performance, as the Statute of Frauds only requires that the contract shall be signed by the party to be charged, but A could not sue B (Indermaur's Equity, 230). (*b*) Neither party could here

sue for specific performance, because the acceptance is subject to a condition, and does not appear to be intended to amount to a concluded agreement. (Winn v. Bull, 7 Ch. D., 29; Indermaur's Equity, 219.)

Q. Will Equity decree specific performance of a contract— (1) *to sell a chattel;* (2) *to do some personal act;* (3) *not to do a certain thing?*

A. (1) Yes the Court will do so if the chattel is of some special value, *e.g.*, an object of *vertu*, a picture, or the like (Falcke v. Gray, 5 Jur., N. S., 645). There is also a general discretionary power in the Court irrespective of peculiar value under the Sale of Goods Act 1893, sec. 52. (2) No, for it would be impossible to compel obedience to it. (3) Yes, where there is a direct agreement not to do a certain thing, the Court will practically give specific performance by granting an injunction. (Whitwood Chemical Co. v. Hardman (1891), 2 Ch., 416.)

Q. What cases of specific performance stand outside the Statute of Frauds?

A. (1) Where there has been part performance of the oral contract (Lester v. Foxcroft, 1 Wh. & Tu., 881). (2) Where the contract was intended to be reduced into writing, but has been prevented from being so by the fraud of the defendant. (3) Where the contract, although oral, is set out in the statement of claim, and admitted in the statement of defence, and the defendant has not pleaded the Statute of Frauds. In each of these cases although the contract was one for which writing was required by the Statute of Frauds, yet the Court will decree specific performance of the oral contract. (Indermaur's Equity, 220, 221.)

Q. Explain the doctrine of Equity as to part performance of oral contracts.

A. Where there has been a contract by word of mouth only, but which ought, according to law, to have been in writing, the Court will decree specific performance if acts

have been done by the parties towards the performance of such contract (Lester v. Foxcroft, 1 Wh. & Tu., 881). It is not, however, every act which will be sufficient part performance. The rule is that it must be some act exclusively referable to the contract, done with no other view than to perform it, and of such a nature that it would be a fraud now not to carry out the contract. Part, or even entire, payment of the purchase-money, or delivery of the abstract, will be insufficient; but letting the purchaser into possession will be, for he cannot be placed *in statu quo*, as if the Court did not recognize and give effect to the contract he would be a trespasser. (Indermaur's Equity, 221.)

Q. Where a contract has been reduced into writing, will the Court ever receive evidence of, and give effect to, a subsequent oral variation?

A. A distinction must here be observed between the position of a plaintiff seeking, and a defendant resisting, specific performance. In the latter case the Court will always admit such evidence, for the Statute of Frauds does not say that the written contract shall bind, but that the unwritten contract shall not. In the former case the Court will not generally admit such evidence, but it will do so in the following cases:—(1) After there have been acts of part performance, of the nature before described, as regards the principal contract. (2) Where the defendant in his defence sets up an oral variation as a reason for non-performance of the written contract, and the plaintiff then amends his claim, and seeks specific performance with the oral variation. (3) When the oral variation has not been introduced into writing by reason of the defendant's fraud. (Woollam v. Hearn and notes, 2 Wh. & Tu., 508.)

Q. Enumerate some of the chief defences to an action for specific performance.

A. That the contract itself is immoral, or contrary to public policy; that some fraud was practised on the

defendant, or there were circumstances of accident, mistake or surprise; that there has been a subsequent variation of the contract, even though such variation was by oral contract only; that it is practically impossible to compel the doing of the thing contracted to be done, *e.g.*, a contract to do some personal act; that the contract is of such a nature that damages will compensate the plaintiff. (Indermaur's Equity, 231.)

Q. Will the Court decree specific performance of—(a) *a contract to build or repair;* (b) *a contract to sell the goodwill of a business?*

A. (*a*) The Court will not decree specific performance of a contract to repair premises, considering that damages will compensate. As to a contract to build, this is doubtful; but probably the Court will not grant specific performance; (*b*) No, not if the contract only relates to the goodwill, but a contract for the sale of a goodwill and of the premises, where the business is carried on, will be enforced. (Indermaur's Equity, 233.)

Q. A agrees to sell a house and land to B. He can make a good title to the house and a portion of the land, but to a small part of it he cannot make a title. What are the rights of A and B respectively as regards specific performance?

A. As regards A, if he knew he had no title to the part of the property when he put it up he cannot enforce specific performance, nor can he if the part is really material to the enjoyment of the whole. Assuming, however, that he had no such knowledge and that the part is not material, he can enforce specific performance, allowing an abatement out of the purchase-money as compensation to the purchaser. As regards B, he can in all cases enforce specific performance with an allowance as compensation for the portion to which a title cannot be made. (Indermaur's Equity, 236.)

Q. To what extent does lapse of time prevent a person enforcing specific performance of a contract?

A. (1) The rights on the contract may be statute barred. (2) Irrespective of this, as the granting of specific performance is a discretionary remedy, though the party's rights, looked at in a legal light, may not be statute barred, yet if he has been guilty of laches, and has let the matter rest for a considerable time, the Court will refuse to give this relief, acting on the maxim, *Vigilantibus non dormientibus æquitas subvenit.* (Indermaur's Equity, 238.)

Q. On a sale of land, the vendor and purchaser both die before completion. Who are the parties by and against whom the contract may be specifically enforced?

A. The vendor's personal representatives should sue or be sued as the case may be, for they represent his estate, and, under the Conveyancing Act 1881, sec. 4, have full power to convey. The purchaser's executor or administrator together with the devisee or heir-at-law, as the case may be, should be sued, and the devisee or heir-at-law, as the case may be, can sue.

Q. Will Equity decree specific delivery of a chattel when there is no contract?

A. Yes, when a chattel is wrongfully detained and is an heirloom, or for some reason of peculiar value to the owner, so that damages for the detention would not sufficiently compensate. (Pusey v. Pusey, 1 Wh. & Tu., 961; Duke of Somerset v. Cookson, 1 Wh. & Tu., 962.)

8. Infants, Partition, &c.

Q. Who is the natural guardian of an infant? What powers of appointing guardians have the parents? and what are the powers of the Court as to custody of children?

A. The father is the natural guardian of his children, and

has a right to their custody. By 12 Car. II., c. 24, he could, by deed or will, appoint a guardian until marriage or full age; and now, by the Guardianship of Infants Act 1886, the mother is, after the father's death, to be the guardian, either alone or jointly with the guardian appointed by the father; and she may by deed or will appoint a guardian to act after the death of herself and the father. The Divorce Court has under this Statute, power after a decree, to pronounce the guilty party unfit to have the custody of the children (sec. 7), and, by the Custody of Children Act 1891, the Court may refuse the custody of a child to a parent who has abandoned or deserted it. By the Acts above referred to, and by its general jurisdiction, the Court has full powers of making such arrangements as to the custody and education of a child as it thinks best for the child's welfare. (Indermaur's Equity, 245-254.)

Q. Under what circumstances will the Court in the exercise of its general jurisdiction remove an infant from the custody of the parent?

A. When the parent is living in immorality, or is guilty of constant drunkenness, or continually ill-treats the infant, and generally where the parent's conduct is such that it will probably be injurious to the morals and interests of the child. (Wellesley v. Duke of Beaufort, 2 Russ., 1; Indermaur's Equity, 249.)

Q. What statutory provisions have been made extending the original jurisdiction of the Court with regard to the custody of infants?

A. Under the Infants Custody Act 1873 (36 Vict., c. 12), the Court has power irrespective of any misconduct on the part of a father to give the custody of a child to the mother up to the age of 16. By the Guardianship of Infants Act 1886 (49 & 50 Vict., c. 27), the Court may, on the application of the mother, make such order as it thinks fit, regarding the custody of an infant, and the right of access of either

parent. It has been held under this provision that the Court has jurisdiction to order the delivery of an infant to the custody of its mother, without fixing any limit as to age. (*Re* Witten, 57 L. T., 336; Indermaur's Equity, 253, 254.)

Q. A husband and wife separate, and it is mutually agreed that the wife shall have the custody of the children. Is this agreement binding?

A. Under the Infants Custody Act 1873, this is a matter entirely in the Court's discretion, it being, however, specially enacted that the Court shall not enforce any such agreement, if of opinion that it will not be for the benefit of the infant to do so. Before this statute such an agreement would never be enforced by the Court, unless the circumstances were such that had the Court been applied to, it would have removed the children from the father's custody. (Indermaur's Equity, 250, 251.)

Q. What is meant by a ward in Chancery? How does the Court act generally with regard to its wards?

A. Strictly speaking a ward in Chancery is an infant who is under a guardian appointed by the Court, but whenever a suit is instituted in Chancery relating to the person or property of an infant, he or she is treated as a ward of Court, though no guardian may be actually appointed. The Court is studious to protect the person and property of its wards, and nothing can be done with regard to either without the Court's sanction, and any one interfering with the infant, or his or her property, without the Court's sanction, is guilty of a contempt of Court, *e.g.*, where a man marries a female ward without the Court's consent. (Eyre v. Countess of Shaftesbury, 2 Wh. & Tu., 693.)

Q. Under what circumstances will the Court allow the income of an infant's property, or part of it, to be applied towards his or her maintenance? What principles guide the Court as to the amount to be allowed for maintenance?

A. When the infant has no parent, or the parent is not

in a position to adequately maintain the infant according to his or her station in life. When the Court allows maintenance, it does not always act strictly on the view of the direct maintenance and education of the infant being the only object to be attained, but it has a liberal regard to the circumstances and state of the family to which the infant belongs. Thus, if there are several children and one only has a fortune and they are all living with the parent, the Court will make such an allowance as will practically benefit all the children. (Indermaur's Equity, 255, 256.)

Q. What is the rule observed by the Court as to the religion in which a child is to be brought up?

A. The general rule is that the religion of the father is to be followed, unless the child is of some reasonable age of discretion, and has already received education in another religion to such an extent as to render it dangerous and improper to effect any change in it. And although a father may have agreed to his child being brought up in a religion other than his own, it has been held that such agreement cannot be enforced, as it is contrary to public policy to allow a father to abdicate a duty naturally imposed upon him. (*Re* Agar-Ellis, Agar-Ellis v. Lascelles, 10 Ch. D., 49.)

Q. Under what circumstances is a settlement made by an infant valid and binding?

A. A valid settlement can be made with the consent of the Court by males at 20, and females at 17, but with regard to powers of appointment and disentailing assurances executed by an infant tenant-in-tail, these are only valid if the infant subsequently attains full age (18 & 19 Vict., c. 43). Settlements not made under the Act are not absolutely void, but voidable within a reasonable time after the infant attains full age. (Edwards v. Carter, 69 L. T., 153; Indermaur's Equity, 260, 261.)

Q. Of what property can partition be made, and who can claim partition?

A. Partition can be made of freeholds, copyholds, and leaseholds. At Common Law only co-parceners could claim it, but by the Statutes of Partition joint tenants and tenants in common have equal right; and a mortgagee of a joint owner can also compel it. A person can only maintain an action for partition where he is entitled in possession, and where his title is manifest, and no litigation is required to determine whether he is interested or not. (Indermaur's Equity, 265, 266.)

Q. What are the provisions of the Partition Act 1868 *as regards the power of the Court to order a sale in the place of a partition?*

A. There are three distinct provisions: (1) If it appears to the Court that a sale would be desirable in the interests of the parties, the Court, on the application of any party interested, may order a sale; (2) If parties entitled to a moiety or more request a sale, the Court shall order one, unless it sees good reason to the contrary; (3) If any person interested requests a sale, the Court may order one, unless the other parties interested undertake to purchase his share, and may order a valuation for that purpose. (Indermaur's Equity, 266, 267.)

Q. What is an action to settle boundaries, and when will such an action be entertained?

A. Where two proprietors dispute as to their boundaries, an action to settle them may be brought in the Chancery Division. It is not sufficient to ground such an action that the boundaries are merely in dispute, but there must also be some equity superinduced by the act of one of the parties, *e.g.*, some particular instances of fraud, or some gross negligence, &c., on the part of a person whose special duty it is to preserve or perpetuate the boundaries. (Indermaur's Equity, 271, 272.)

9. Election, Satisfaction, Performance, Conversion, &c.

Q. Define and illustrate the doctrine of Election.

A. It may be defined as the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both (Indermaur's Equity, 273). Thus A, being entitled to Whiteacre in fee simple, and Blackacre in fee tail, devises Whiteacre to his eldest son and Blackacre to his second son. At Law the eldest son would get both estates—Whiteacre because it was devised to him, and Blackacre because of the Statute De Donis (13 Ed. I., c. 1). But in Equity the eldest son would be put to his election. (Noys v. Mordaunt, 1 Wh. & Tu., 395.)

Q. With regard to the doctrine of Election, what rule was established by the leading case of Streatfield v. Streatfield? (1 *Wh. & Tu.*, 997.)

A. That a person who elects against a will does not necessarily forfeit the whole benefit given to him by it, but only so much as is necessary to compensate the disappointed devisee—in other words, it establishes the principle that compensation and not forfeiture is the doctrine. (Indermaur's Equity, 276.)

Q. Define the doctrine of Satisfaction. What equitable maxim does it illustrate?

A. It may be defined as the making of a donation with the intention expressed or implied that it is to be an extinguishment of some existing right or claim of the donee. It may be divided into two wide classes, viz.: (1) Satisfaction arising in the case of a child, or one towards whom the donor stood *in loco parentis*, followed by some subsequent benefit; and (2) Satisfaction arising in the case of a legacy given to a creditor. The doctrine is founded upon and illustrates the

maxim, "Equity imputes an intention to fulfil an obligation." (Indermaur's Equity, 285, 286.)

Q. Does the Court lean in favour of or against the doctrine of satisfaction? Give illustrations.

A. It leans in favour of the doctrine in the first class of cases referred to in the last answer, and against it in the second class. Thus, if a father covenants to provide a portion for his child of £5,000, and then on his marriage advances him £2,000, this will be deemed to be a satisfaction *pro tanto*, and he only remains liable for £3,000, in the absence of evidence to the contrary (see *Ex parte* Pye, 2 Wh. & Tu., 364). But if A, owing B £1,000, leaves him £500 by his will, this will be no satisfaction *pro tanto*, but B will get the £1,000 and the £500, for it is necessary for a legacy to satisfy a debt that it should be equal to or greater in amount, and in every possible respect equally beneficial. (See Talbot v. Duke of Shrewsbury, 2 Wh. & Tu., 378; Chancey's case, *Ib.*, 379.)

Q. What inquiries should an executor make before paying legacies to children of the testator who have married since the date of the will, and before their father's death?

A. He should inquire whether some advancement was not made to the children upon their respective marriages; because if there was this would operate as a satisfaction or ademption *pro tanto* of the legacy, and the children would only be entitled to so much of the legacy as exceeded the advancement. (Indermaur's Equity, 288.)

Q. A testator made a will bequeathing £3,000 in trust for his daughter for life, with remainder to her children, and afterwards gave to her in his lifetime a sum of £500. Would that be in satisfaction pro tanto of the legacy? Would evidence be admissible that the testator so meant it?

A. Yes, the gift of £500 is *primâ facie* a satisfaction *pro tanto* of the legacy—a legacy to a daughter for life, with remainder to her children as a class is a portion (Kirk v.

Eddowes, 3 Hare, 509). It was decided in this case that parol evidence is admissible to rebut the presumption of satisfaction which equity draws from the bare facts, although it is inadmissible to alter, add to, or vary a written instrument, or to prove that a written instrument was intended to have an effect not expressed in it. (2 Wh. & Tu., 398, 401.)

Q. What is the rule of the Court where a legacy is given twice over in a will to a legatee, or where a legacy is given by a will, and then another legacy to the same legatee by a codicil?

A. If a general legacy of the same amount is given twice in the same will, for the same cause, and in the same words, or with only small differences, then the legatee will not get both, but the one is in substitution or satisfaction of the other. But if a general legacy is given by will, and to the same legatee there is a general legacy given by codicil, then in the absence of internal evidence to the contrary the legacies will be cumulative, and the legatee will get them both. (Hooley v. Hatton, 2 Wh. & Tu., 349.)

Q. A covenants to leave his wife £625 by will. He dies intestate, and the wife claims to have this amount first paid to her, and then to take her share in the balance of the personal estate under the Statute of Distributions. Is this claim maintainable?

A. It is not; she is only entitled to her distributive share, that is, of course, assuming it exceeds £625. The Court considers the covenant practically performed in this way, for "Equity imputes an intention to fulfil an obligation." (Blandy v. Widmore, 2 Wh. & Tu., 428.)

Q. Define the equitable doctrine of Conversion. What is the leading case on the subject?

A. It is an implied or equitable change of property from real to personal, or from personal to real, so that each is considered transferable, transmissible and descendible according to its new character. Thus A, by his will, directs

his real estate to be sold, and the proceeds paid to B. On A's death this is considered at once as money, so that were B then to die it would go to his personal representatives. The leading case is Fletcher v. Ashburner (1 Wh. & Tu., 971). (Indermaur's Equity, 308, 309.)

Q. Define and illustrate the doctrine of Reconversion.

A. It may be defined as that notional or imaginary process whereby a prior constructive conversion is annulled. Thus, in the case put in the last answer, suppose that on A's death B were to inform the trustees, under A's will, that he did not desire a sale, but intended to take the real estate as it stood, this would effect a reconversion, and the result would be that if B were then to die, the property would go to his heir. (Indermaur's Equity, 308, 324.)

Q. Explain the decision in Ackroyd v. Smithson. (1 *Wh. & Tu.*, 1027.)

A. A conversion directed by will is only deemed to operate for the purposes specified in the will, and if those purposes do not exhaust the whole of the fund, the surplus will go to the person who would have taken it if the will had not directed a conversion. Thus, if testator devises Whiteacre to trustees in trust to sell for payment of his debts, and it realises £10,000 and the debts are only £7,000, the surplus £3,000 will go to testator's residuary devisee (or heir). As such residuary devisee (or heir) is the absolute owner of the surplus, it will (if he dies before it is paid to him) devolve in its actual condition of money to his legal personal representative. (Indermaur's Equity, 317, 318.)

Q. John Brown was entitled in fee to one-quarter of Blackacre. A partition action was instituted, and Blackacre was sold, by the order of the Court, for £5,000. John Brown died, an infant, in 1892, *leaving a widow, a son, and a daughter. What becomes of his share in the proceeds of Blackacre?*

A. There is an equity here preventing the effect of the

conversion brought about by the sale under the Court's order (Foster v. Foster, 1 Ch. D., 588). Therefore, subject to the widow's dower (if any), the son takes the money. (Indermaur's Equity, 322, 323.)

10. Penalties, Forfeitures, Injunctions.

Q. In what cases, and on what principles, did the Court of Chancery give relief against penalties and forfeitures?

A. The Court always gave relief in cases of provisions for payment of money when there was a stipulation for payment of a larger sum if not paid at the time mentioned, or for forfeiture of any property by reason of non-payment of money; but the Court will not (except as now provided by Statute) give relief in the case of forfeiture of estates (Peachey v. Duke of Somerset, 2 Wh. & Tu., 1245). The Court acts upon the principle which is embodied in the maxim, "Equity regards the spirit and not the letter." (Indermaur's Equity, 334, 336.)

Q. Explain the grounds upon which, and state the cases in which, Courts will relieve against penalties and forfeitures?

A. Upon the grounds that the penalty or forfeiture was inserted to secure the doing of some collateral act, and that the Court can give due compensation, for "Equity regards the spirit and not the letter," so that in all cases of provisions for payment of money any stipulation for payment of a larger sum, if not paid at the time named, or for forfeiture of any property by reason of non-payment, will always be relieved against (Sloman v. Walter, 2 Wh. & Tu., 1257). So also, from a very early time, the Court of Chancery granted relief in cases of forfeiture by tenants of their leases by reason of non-payment of rent, upon the principle that the right of entry was intended merely as a security for the debt, and that, provided the rent, interest

thereon, and all costs were paid, the landlord was put in the same position as if the rent had been paid to him originally. A similar power was conferred on the Courts of Common Law by the Common Law Procedure Act 1852. But if the performance of the thing itself is essential the Court will not relieve (Peachey v. Duke of Somerset, 2 Wh. & Tu., 1245). With regard to forfeitures under leases, and relief therefrom, special provision is now made by Section 14 of the Conveyancing Act 1881. (Indermaur's Equity, 335-338.)

Q. State the rights of the parties in the following cases:— (a) *A lease contains covenants to pay rent, to keep the property in repair, and not to assign without a licence, and also a power of re-entry for breach of covenant. The covenants are broken.* (b) *A mortgagor covenants to repay an advance of* £1,000 *on a certain day and interest at* 4 *per cent., and in default of punctual payment on the day named to pay* £1,200 *and interest at* 5 *per cent.* (c) *A builder agrees to finish a building in a month, and in default to pay his employer* £1,000. *The building is not completed until three days after the time named.* (d) *A agrees with B, to whom he is selling a business, not to carry on a similar business within five miles, and in case of breach of such agreement to pay* £100. *A starts a business in breach of the covenant, and offers B* £100.

A. (*a*) Relief can be had against a forfeiture for non-payment of rent, at any time within six months after execution in the action of ejectment. Re-entry for breach of the covenant to repair is governed by the Conveyancing Act 1881 (section 14), and the lessor must serve a notice specifying the breach, and if capable of being remedied, requiring it to be remedied, and specifying the monetary compensation required (if any); and the Court has absolute discretion to relieve against the forfeiture at any time before actual entry by the lessor. The Court cannot relieve against re-entry for breach of the covenant not to assign, if the

lessor wishes to re-enter. (*b*) Equity will relieve against the covenant to pay the £1,200 and 5 per cent., as it is looked upon in the nature of a penalty, on the mortgagor paying the £1,000 and 4 per cent. (*c*) The Court will not allow the employer to recover the whole £1,000 (being a penalty), but only such reasonable portion thereof as a jury assess. (*d*) The Court will grant an injunction to restrain A from carrying on the business, as it is in B's choice which remedy he prefers. (Indermaur's Equity, 335-341.)

Q. What is meant by an injunction? Give instances of cases in which the Court would interfere by granting an injunction.

A. An injunction is a judicial process whereby a party is required to abstain from doing a particular act, or to do a particular act, in which latter case it is styled a mandatory injunction (Indermaur's Equity, 372). The following are instances :—To prevent waste; to prevent infringement of patents, copyrights, or trade marks; to prevent a person acting contrary to his express covenant; to prevent the commission or continuance of a nuisance.

Q. Distinguish between a perpetual and an interlocutory injunction. What terms does the Court always impose on granting an interlocutory injunction?

A. A perpetual injunction is one granted at the hearing of a cause, and absolutely prohibits the act complained of. An interlocutory injunction is one granted at some intermediate stage and may be *ex parte*, and it only prohibits the act for a certain time, *e.g.*, until the next motion day, or until the hearing of the cause. The Court will only grant an interlocutory injunction on the terms of the plaintiff undertaking to abide by such order as the Court may think fit to make thereafter, should it ultimately be of opinion that no injunction ought to have been granted, and that damage has been caused thereby to the defendant. (Indermaur's Equity, 388.)

Q. Will the Court grant injunctions against waste in the following cases:—(a) *where plaintiff is claiming an estate against a defendant in possession claiming to be owner in fee;* (b) *where plaintiff is mortgagor and defendant is mortgagee in possession;* (c) *where defendant is owner in fee subject to an executory devise, which, if a certain event happens, will carry the estate over to the plaintiff.*

A. (*a*) An injunction will be granted here, for the Court will keep the property intact until the title has been decided (Talbot v. Scott, 4 K. & J.) (*b*) The mortgagee in possession may cut and sell ripe timber under the Conveyancing Act 1881, but he will be restrained from committing other acts of voluntary waste, unless, indeed, his security is a scanty one, when the Court will not interfere. (*c*) An injunction may be had to prevent equitable waste. (1 Wh. & Tu., 860.)

Q. If, before an injunction, timber has been wrongfully cut and sold, how does the Court regulate the rights to the proceeds of sale?

A. As a general rule, where the timber is severed by the act of a trespasser, or by the waste of the tenant, or by act of God, *e.g.*, tempest, while the tenant for life impeachable for waste is in possession, the proceeds become at once the property of the owner of the first vested estate of inheritance *in esse*, even although there is an intervening life estate. The result is the same if the wrongful severance is by a tenant for life impeachable for waste. Lord Romilly, however, was of opinion that unless the tenant for life was the guilty party the proceeds should be invested and the income paid to the tenant for life. (1 Wh. & Tu., 872, 873.)

Q. A buys a plot of freehold land from B, and covenants that he will lay out £1,000 in building on the land, and also that he will not use any building on the land for a manufactory. A sells the land to C. Can the covenants, or either

of them be enforced by B against C, and if so, how, and on what ground?

A. By the rules of Common Law, the burden of a covenant relating to freehold land does not run with the land, and neither covenant could be enforced against C. But in Equity the burden of a restrictive covenant runs with the land to anyone who takes with actual or constructive notice of it, so that an injunction can be obtained by B against C as regards the manufactory (Tulk v. Moxhay, 2 Phil., 774). And since the Judicature Acts, the rule of Equity prevails.

Q. Will the Court interfere by injunction to restrain the publication of a libel?

A. Before the Judicature Acts it would not, but it has been held that since these Acts it will. This jurisdiction to the fullest extent has only been recently thoroughly established, for at first the Court would only interfere in this way in case of libels affecting a man's property, trade, or business, but in later cases it has been held that the Court can in its discretion interfere by injunction in any case. In very clear cases the Court will even go so far as to grant an interlocutory injunction. (Indermaur's Equity, 385, 386.)

Q. What is a writ Ne exeat regno, and when is it issued?

A. It is a writ issued to restrain a person from leaving the realm, and is now only issued in cases coming under the Debtors' Act 1869, *i.e.*, to prevent the defendant leaving the country, where the plaintiff makes an affidavit that the defendant is indebted to the extent of £50 at least, and (except in the case of a penalty other than a penalty arising under a contract) that the defendant's absence will materially prejudice the plaintiff in the prosecution of his claim. (Drover v. Beyer, 49 L. J., Ch., 37; Indermaur's Equity, 389.)

11. Married Women.

Q. What was, and what is now since 1882, *the position of a married woman as regards her property?*

A. As regards freeholds, the husband was entitled to the rents and profits, and if he had heritable issue by her born alive, he had an estate by the curtesy. As regards leaseholds, they vested in the husband absolutely, and he could dispose of them in any way, except by will. As regards other property, *choses in possession* vested absolutely in him, but if *choses in action*, he had to reduce them into possession. If he survived her, he took all her personalty, including leaseholds. Now, by the Married Women's Property Act 1882, as regards a woman married since the Act, all her property is to her separate use, and, as regards a woman married before the Act, all property the title to which accrues to her since the Act (see Reid v. Reid, 31 Ch. D., 402), is her separate property. (Indermaur's Equity, 343, 345.)

Q. What is meant by a fraud on a husband's marital rights?

A. Where a woman was engaged to be married, and made a settlement or other disposition of her property secretly, without the knowledge and consent of the intended husband, it operated as a fraud on him, and would be set aside (Countess of Strathmore v. Bowes, 1 Wh. & Tu., 471). This, however, is of little importance now, owing to the effect of the Married Women's Property Act 1882, which appears to render the doctrine obsolete. (Indermaur's Equity, 345, 346.)

Q. Explain the nature and effect of the clause against anticipation that may be annexed to a gift to a married woman for her separate estate.

A. It is a clause providing that she shall not anticipate, but shall only receive the income of her property as and

when it becomes due from time to time. The effect of the clause was fully considered in the leading case of Tullett v. Armstrong (Indermaur's Conveyancing and Equity Cases, 87), where it was laid down that it was only applicable during marriage; but that, if property was given to a then unmarried woman for her separate use without power of anticipation, the clause became effectual upon her subsequent marriage, and that the clause would cease to have effect on her becoming a widow, though capable of reviving on a subsequent marriage if apt words were used. Under the Conveyancing Act 1881 (sec. 39) the Court has power, if it thinks fit, on a married woman's application, if for her benefit, to enable her to dispose of her property notwithstanding the anticipation clause. (Indermaur's Equity, 349, 354.)

Q. A testator left his residuary estate to his married daughter for her separate use absolutely, without power of anticipation. In her marriage settlement there was a covenant for settlement of after-acquired property. Would she be compelled to bring such residue into settlement? What is the effect of a restraint on anticipation as applied to the capital of a fund given absolutely to a married woman for her separate use?

A. No, the restraint on anticipation is a restraint on alienation, and the covenant in the settlement has no effect on this property (*Re* Curry, Gibson v. Way, 54 L. T. Rep., 665). It used to be thought that if it was an income-bearing fund, the restraint was operative, and that if it was a sum of cash, the restraint was inoperative; but the Court of Appeal, in *Re* Bown, O'Halloran v. King (27 Ch. D., 422), decided that this accident made no difference, and it depends on every occasion on what the Court gathers, from the words used in the will, that the testator really intended. The Court has power to remove the restraint under Section 39 of the Conveyancing Act 1881.

Q. A married woman allows her husband to receive the income of her separate property for several years. Can she afterwards demand an account from him and payment of the amount he has received?

A. No, she cannot, for the allowing him to receive it will usually amount to a gift of it to him, either for the benefit of the family or otherwise (Caton v. Rideout, 1 Mac. and G., 599). This principle does not, however, ordinarily apply to capital received by the husband. (*Re* Flamank, Wood v. Cock, 40 Ch. D., 461.)

Q. What debts or contracts of a married woman will bind her separate estate?

A. If settled without power of anticipation no debts or contracts will affect her property, but if not, then under the Married Women's Property Act 1882 (sec. 1 (4)) all her debts or contracts bind her separate estate which she was then possessed of or which she might subsequently acquire. Under this provision it was, however, decided that to render subsequently acquired separate estate liable she must be possessed of some free disposable separate estate at the time of contracting the debt (Palliser v. Gurney, 19 Q. B. D., 519). The law on this point has, however, been recently altered by the Married Women's Property Act 1893 (sec. 1), and all her debts or contracts will bind her separate property which she either possessed at the time, or acquired afterwards, and whether she was at the time possessed of any separate estate or not. It is, however, specially provided that nothing in this provision is to render any separate property which she is restrained from anticipating liable to satisfy any debt. (Indermaur's Equity, 358.)

Q. A spinster incurs debts and then marries, settling all her property upon herself for life without power of anticipation, and after her death upon her husband for life, and then to the children of the marriage. Can the ante-nuptial creditors

enforce their claims against the property comprised in the settlement?

A. As regards the rights of the husband and the children they cannot, but as regards the woman's life interest they can, for it is provided by the Married Women's Property Act 1882 (secs. 13, 19) that a woman after her marriage shall continue liable in respect of, and to the extent of, her separate property for all ante-nuptial debts and torts, and that she cannot by settling the property on herself, without power of anticipation, deprive creditors of their rights under this provision. (Indermaur's Equity, 356, 357.)

Q. A marriage settlement on a marriage in 1850 *contained a covenant by husband and wife to settle all after-acquired property of the wife. The wife predeceased her husband, and was at her death entitled to a reversionary fund, which subsequently fell into possession during her husband's life. Will it belong to him or be bound by the covenant, and therefore payable to the trustees of the settlement?*

A. The fund is bound by the general covenant, as it falls into possession during the husband's life (Hughes v. Young, 32 L. J., Ch., 137; Fisher v. Shirley, 61 L. T. Rep., 668); and the Married Women's Property Act 1882 has made no difference on this point.

Q. What is meant by (a) *pin-money,* (b) *paraphernalia?*

A. (*a*) Pin-money is an allowance settled upon the wife before marriage for her expenditure upon her person, to meet her personal expenses, and clothe her according to her proper rank and station. One year's arrears of pin-money only can ordinarily be recovered by the wife. (*b*) Paraphernalia consists of such apparel and ornaments of the wife, given to her by her husband, as are suitable to her rank and condition in life. The property she possesses in paraphernalia is of an anomalous character, for she has no power to dispose of it during her husband's life, whilst the husband can dispose of it (except her necessary wearing apparel)

either by sale or gift *inter vivos*, though not by will, so that on his death she is absolutely entitled to it, but subject to payment of his debts. (Indermaur's Equity, 361, 362.)

Q. Explain the grounds upon which the doctrine of a wife's equity to a settlement was introduced. Why is the doctrine of less practical importance than it was formerly?

A. It does not depend on a right of property in the wife, but is entirely the creation of Equity and has its origin in the maxim, "He who seeks Equity must do Equity." It was a condition imposed by the Court in cases where the husband was obliged to seek its assistance to enforce his Common Law right to reduce his wife's *choses in action* into his possession. The doctrine is of less practical importance now than formerly, because if the marriage is since 1882, or if the wife's title to the property accrues since 1882, the *chose in action* is made separate property by the Married Women's Property Act 1882. (Indermaur's Equity, 363-368.)

Q. What is the wife's right by survivorship, and how was it affected by Malins' Act?

A. It consists of her right to her outstanding property, not reduced into possession, if she survives her husband, and needs no active enforcement, and the result, therefore, was that a married woman could not, even with her husband, effectually assign her reversionary interests in personalty or other *choses in action*, for if she survived, notwithstanding her disposition, the property survived to her, and she could repudiate what she had previously done. Malins' Act (20 & 21 Vict., c. 57), provided that every married woman might, with the concurrence of her husband, by deed acknowledged, dispose of every reversionary interest, whether vested or contingent, under any instrument (not being her marriage settlement) made since 31st December, 1857. (Indermaur's Equity, 368-370.)

Q. What testamentary power has a married woman since 1882*?*

A. If married before the Married Women's Property Act 1882, she can dispose of all property the title to which in possession, reversion, or remainder, accrues to her since the Act and during the coverture, as if she were a *feme sole;* and a woman married since the Act can dispose of all her property as if she were a *feme sole.* Such wills now need no longer be re-executed or re-published after the husband's death. (Married Women's Property Act 1893, sec. 3.)

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